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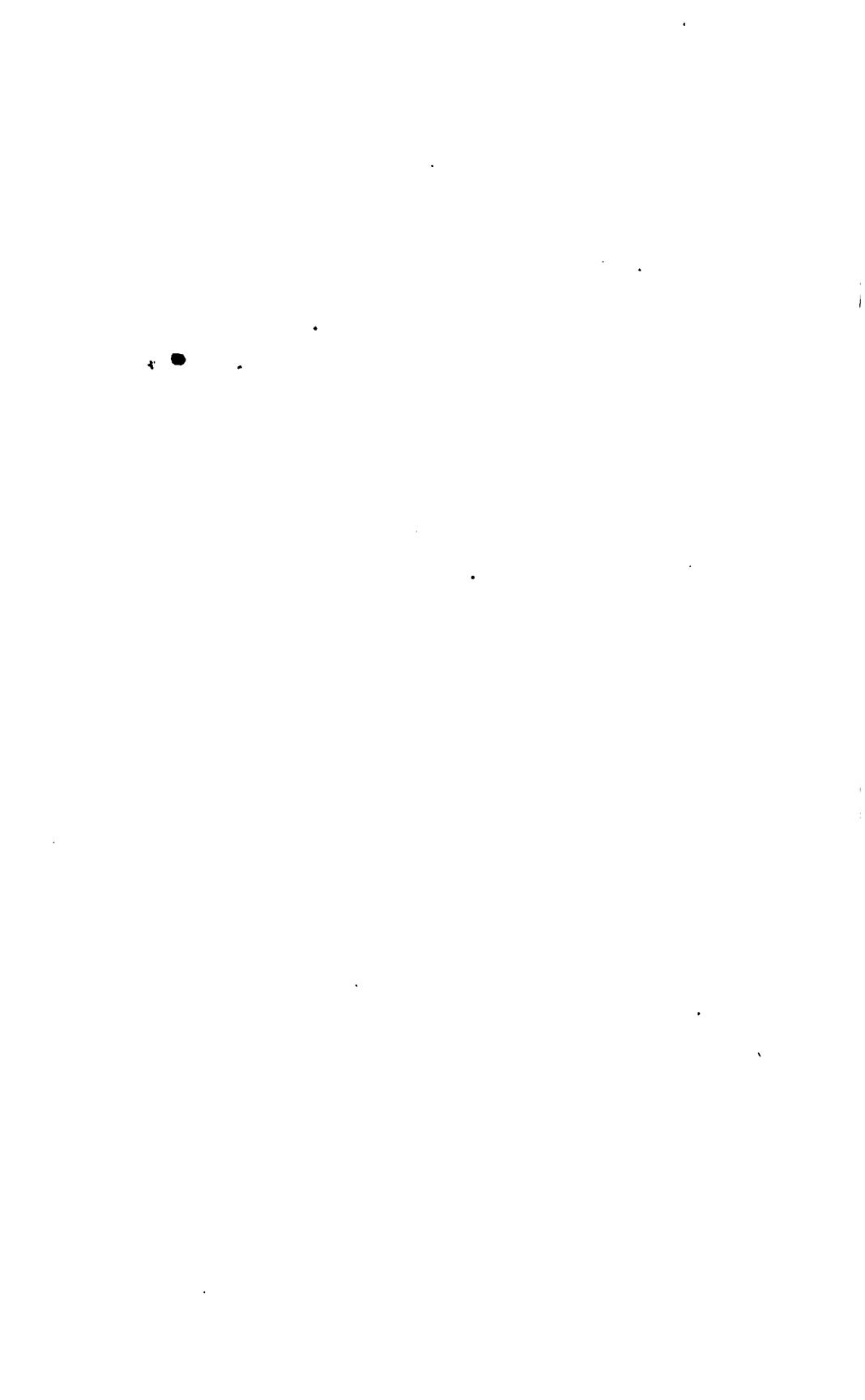
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NEW

REPORTS

OF

CASES

HEARD IN

THE HOUSE OF LORDS,

ON

APPEALS AND WRITS OF ERROR;

AND DECIDED

DURING THE SESSION

1832.

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By RICHARD BLIGH, Esq.

BARRISTER AT LAW.

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VOL. VI.

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(SUCCESSORS TO J. BUTTERWORTH AND SON,)

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1835.

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## SESSION 1832.

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**LORD PLUNKET, *Lord Chancellor of Ireland.***

**SIR JOHN LEACH, *Master of the Rolls.***

**SIR LAUNCELOT SHADWELL, *Vice-Chancellor.***

**LORD TENTERDEN, *Chief Justice of the King's Bench.***

**SIR NICHOLAS CONYNGHAM TINDAL, *Chief Justice of the  
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**LORD LYNTHURST, *Chief Baron of the Exchequer.***

**SIR THOMAS DENMAN, *Attorney-General.***

**SIR WILLIAM HORNE, *Solicitor-General.***

**F. JEFFERY, *Lord Advocate.***



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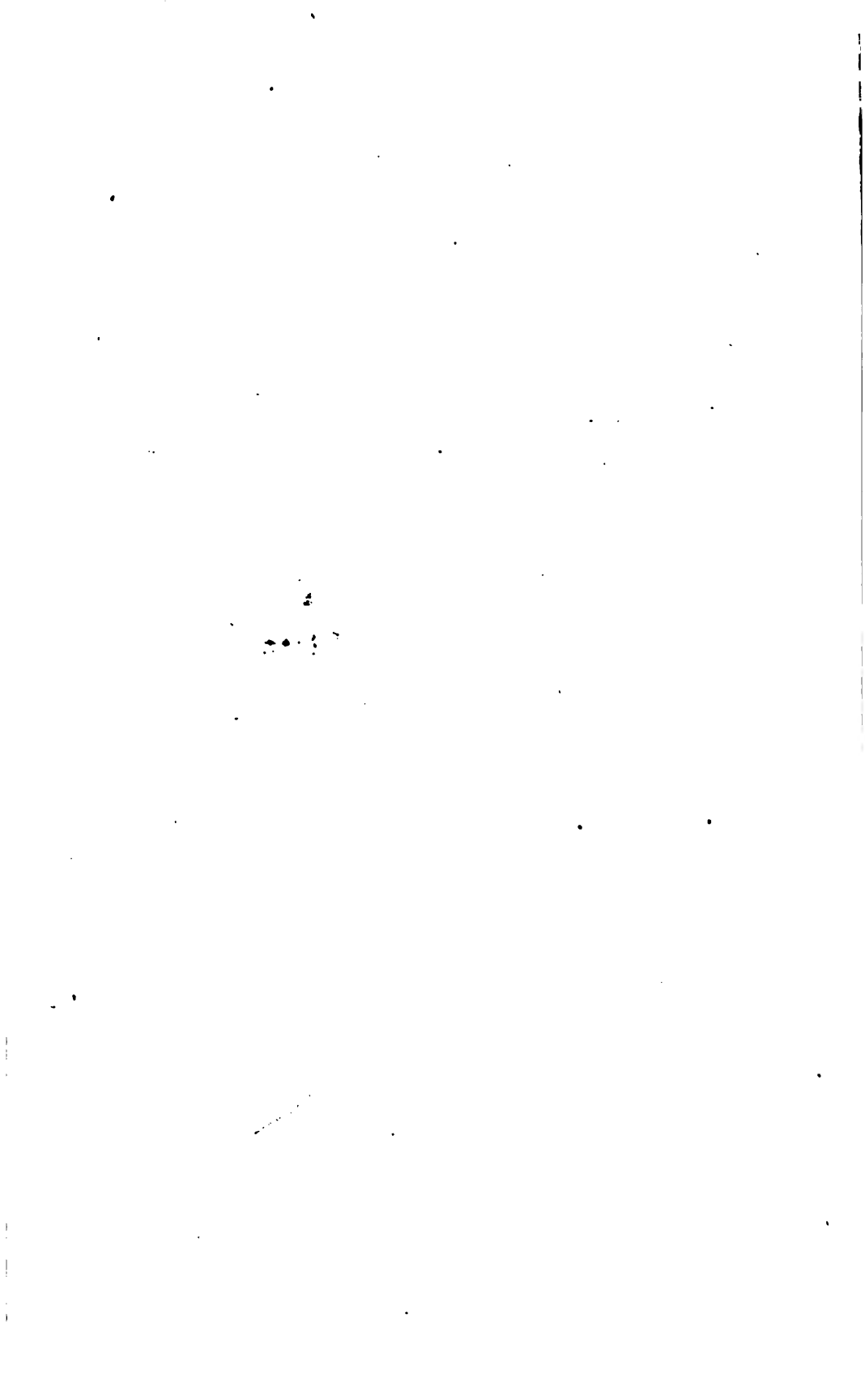
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# REPORTS OF CASES

HEARD IN THE

HOUSE OF LORDS,

UPON APPEALS AND WRITS OF ERROR,

*And decided during the Session 1832,*

2d & 3d W. IV.

1832.

WARBURTON

v.

LOVELAND.

IRELAND. *Cited in [unclear] & [unclear]*

(COURT OF CHANCERY.) *[unclear] 17. 2. H. 399.*

ELIZABETH WARBURTON - *Plaintiff in Error; [unclear] 2. Dec.*

JAMES LOVELAND, Lessee of }  
GEORGE IVIE, HENRY IVIE, } *Defendant in Error.*  
and others - - - }

*M. 480.*

B. being possessed of a term in lands for so many years as he should live, with remainder for the residue of the term to E., his daughter, upon the marriage of E. with W. the term was assigned by B. and E. to trustees, in trust for B. during his life, and upon his death to permit the husband to receive the rents, &c. during his life, and then for the wife and children in the usual course of marriage settlement. This deed of assignment was not registered. W. being in possession under the trusts of the settlement, after the death of B. demised the lands to K., for 345 years, at a rent of 345l., and the indenture of lease was duly registered, and the interest under this demise was afterwards transferred from K. to I. by a deed of assignment, which was not proved to have been registered. Upon special verdict, stating these facts, it was held that the lease made by W. to K., being registered, was, under the effect of the Irish Registry Act,

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WARBURTON  
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6 Anne, c. 2., valid against and preferable to the unregistered marriage settlement, and that the interest of I., under the assignment from K., although unregistered, was also valid, and preferable to the settlement.

**R**ICHARD Christmas, being seised in fee of the town and lands of Shanbough, situate in the barony of Ida, Igram, and Ibercon, and county of Kilkenny, by indenture of lease bearing date the 1st of March, 1713, demised the said lands for the term of 999 years, to Thomas Grubb, who entered into possession.

Thomas Grubb, by his will, appointed Mary Grubb executrix, who, after the death of Thomas Grubb, proved the will, and as such executrix entered into and was possessed of the lands for the residue of the term.

Mary Grubb, by indenture of demise, bearing date the 26th of March, 1748, demised the lands to John Allen for the term of 399 years, and John Allen, after the execution of the lease, entered into the possession of the lands.

The interest in the last-mentioned lease afterwards, by mesne assignment, became vested in Benjamin Batt for so many years of the term as he should live, and the residue of the term after the death of Benjamin was vested in Elizabeth Batt, his daughter.

On the marriage of Elizabeth Batt with Bartholomew Boyd Warburton, by indenture of settlement dated the 24th of July, 1779, and made between Benjamin Batt and Elizabeth Batt, his eldest daughter, of the first part; Bartholomew Boyd Elliott, and the Reverend Robert Alexander,

of the second part ; and Bartholomew Boyd Warburton of the third part ; Benjamin Batt and Elizabeth Batt, in consideration of the intended marriage, assigned the said lands and their respective terms therein to Bartholomew Boyd Elliott and Robert Alexander for the residue of the demised term therein, in trust, to permit Benjamin Batt to receive the rents and profits of the lands during the term of his life, and after his decease to permit Bartholomew Boyd Warburton to receive the rents and profits of the lands during his life ; and in case Elizabeth, his intended wife, should survive Bartholomew Boyd Warburton, then, after his decease, to permit the said Elizabeth to receive the rents and profits thereof during the term of her life ; and after the decease of Bartholomew Boyd Warburton and Elizabeth his wife, in trust, to permit the first son of the marriage to receive the rents and profits until he should arrive at the age of twenty-one years, and then to convey the lands to such first son absolutely ; and in case there should be no issue of the marriage, then the lands and the interest therein should become the sole property of the survivor of them the said Bartholomew Boyd Warburton and Elizabeth, his intended wife.

This deed of settlement was not registered.

After the execution of the settlement the marriage took effect, and Benjamin Batt, during his life, received the rents and profits of the lands of Shanbough under the deed of settlement. After the death of Benjamin Batt, Bartholomew Boyd Warburton entered into possession of the lands, and received the rents and profits.

Bartholomew Boyd Warburton being so in the possession of the lands, by indenture dated the

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 WARBURTON  
 v.  
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26th of May, 1800, demised to George Kough and Thomas Kough the lands of Shanbough, for the term of 345 years, at the yearly rent of 345*l.* 19*s.*, being at the rate of 16*s.* per acre ; and the indenture of lease was on the 10th day of June, in the year 1800, duly registered in the proper registry-office in Ireland.

George Kough and Thomas Kough, under this indenture of lease, entered into possession of the lands ; and, by indenture of assignment, bearing date the 9th of April, 1813, George Kough and Thomas Kough, in consideration of the sum of 3000*l.*, conveyed their interest under the lease to George Ivie and Henry Ivie, two of the Lessors of the Defendant in error, who thereupon entered and were possessed of the lands.

There was no proof that this deed of assignment was not registered.

George and Henry Ivie continued in the possession of the lands, under the deed of assignment, till the time of the death of Bartholomew Boyd Warburton, which happened in the year 1823.

Upon the death of Bartholomew Boyd Warburton, Elizabeth his widow, the Plaintiff in error, claiming to be entitled to the lands under the deed of settlement of the 24th of July, 1779, brought an ejectment in the Court of King's Bench in Ireland, for recovery of the possession of the lands, and laid demises therein in her own name and in the names of the trustees of the settlement of 1779, and in the names of the several other persons in whom the legal estate in the premises might be considered to be outstanding. The cause was tried in 1823, when a verdict was given for the Plaintiff in error.

In Michaelmas term, 1823, the Defendants in error having obtained a conditional order to set aside the verdict, the matter was argued before the Court of King's Bench in Ireland, and that court, on the 26th of November, 1824, allowed the cause shewn against the conditional order, and judgment was thereupon entered for the Plaintiff in error, who took possession of the lands under a writ of *habere facias possessionem*.

The Defendants in error being dissatisfied with the judgment of the Court of King's Bench, in Hilary Term, 1825, brought their ejectment in the Court of Exchequer in Ireland, to recover the possession of the lands, which ejectment was tried in 1825; when it was agreed by the counsel concerned for the parties on each side, that a special verdict should be entered, which was accordingly done.

The special verdict set forth the facts as before stated; and the matter having been argued upon the special verdict before the Court of Exchequer in Ireland, that court, on the 13th of June, 1825, gave judgment thereon for the Defendants in error, who thereupon entered again into possession of the lands, under a writ of *habere facias possessionem*.

The Plaintiff in error being dissatisfied with this judgment of the Court of Exchequer, in Trinity term, 1825, brought her writ of error returnable into the Exchequer Chamber in Ireland, assigning general errors, and the Defendants in error having joined issue on the writ of error, the Court of Exchequer Chamber in Ireland, upon the 26th of June, 1828, affirmed the judgment of the Court

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of Exchequer: whereupon Elizabeth Warburton brought her writ of error returnable in Parliament, and assigned for errors the several matters on which she insisted before the Court of Exchequer Chamber in Ireland, to which George Ivie and Henry Ivie rejoined that there was no error.

The case was argued first in March, 1831, by *Sir E. Sugden* and *Mr. J. P. Abbot*, for the Plaintiff in error, and by *Mr.* and *Mr. Swann*, for the Defendant in error; and again before the Judges in April, 1831, by *Sugden* for the Plaintiff, and *Knight* for the Defendant.

For the Plaintiffs in error.

April 13,  
1831.

The case turns upon the third, fourth, and fifth sections of the Irish act, 6 Anne, c. 2. This act, unlike the English act, 2 & 3 Anne, c. 4., contains no provision making wills void for defect of registration, but only deeds. In England, therefore, if an estate is devised, and not registered, the heir may sell; and the purchaser registering, ousts the devisee: but in Ireland the devise is good, though not registered.

There is nothing in either act enabling registration of titles gained, by devolution of law. Whether a title gained by marriage comes within that description, may be doubtful; marriage being the act of the party.

Nothing in this act provides for registration of title gained by execution.

1. In this case, the title does not begin with a registered instrument; therefore, the benefit of registration cannot be claimed. If A. sells to B. by unregistered deed, and B. sells to C. by registered deed, that does not validate the sale to B. On this point, cases have been decided.

2. The Defendants in error do not bring themselves within the registry act.

The demise from Bartholomew Boyd Warburton was registered; but the assignment to the Plaintiffs does not appear to have been registered, and they must show a registered title in themselves. The registration acts do not interfere with the operation of deeds as between the parties; and registration is only necessary to prevent a subsequent sale, by some of the parties, to a person who might register. The Plaintiffs claiming by unregistered deed, cannot set that up against another unregistered deed.

3. The title of the Plaintiffs is only founded in equity. Bartholomew Boyd Warburton had only an equity.

But, without resting on these points, we rely on the general question.

Elizabeth Warburton had, in 1779, a vested interest in the term: and, on her marriage, the estate was conveyed by her father, tenant for life, and herself, to trustees. The whole term, therefore, passed out of Benjamin Batt and Elizabeth, his daughter, and was acquired by the trustees. It was not essential to register the deed as against Benjamin Batt and Elizabeth Warburton; but only, to guard against Benjamin Batt, Elizabeth Warburton, or both, conveying to a second purchaser.

After Elizabeth Warburton married, she could not, during her coverture, commit any fraud by conveying again: and so far, registering was not necessary. Now, what interest except under the settlement did Bartholomew Boyd Warburton acquire by the marriage? Clearly none — his

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wife having no estate vested in her at the time of marriage, to give him any marital right in the term. How could the husband, then, acquire in his marital right a legal power to commit a fraud by a subsequent sale, so as to defeat the settlement? It is singular doctrine, that a man, having no estate, should be enabled to defeat the wife's conveyance before marriage, by a right in something she once had. Suppose, forty years before marriage, she had sold *bonâ fide* by an unregistered deed; could the husband, forty years after, defeat that sale by any act of his?

The clauses of the act of Parliament are inartificially framed; but the House cannot divest an estate, *bonâ fide* acquired, by any subtle construction of the act. This they would not do, unless they were compelled by very clear words. The fourth section gives to registered deeds priority. The fifth section makes unregistered deeds void against judgments.

We have to consider,

1st. The meaning of the words "right, title, and interest," in the fourth section.

2d. Whether the fifth section is not in construction governed by the fourth.

The words "right, title, and interest," cannot be taken literally; for then the subsequent purchaser could not take any thing. Lord Redesdale put the right construction upon the words in *Latouche v. Dunsany*\*; but here the husband

\* 1 S. & L. 159. The passage in question is as follows:—"It must be understood to mean, according to the right, title, and interest which such person had to make a conveyance, which would have been good if such prior conveyance had not existed."

never had any estate, so the Defendants in error are obliged to construe it a "right," &c., which the party might have had.

The Judges in the Court below, who were of opinion that the Plaintiff in error was entitled to the judgment, say that the right construction is, that the act applies to deeds executed by the *same* person. Under the English act, a purchaser from an heir, with registry, will oust an unregistered devisee. It is different in Ireland\*: yet, under the construction of the Defendants in error, *no person* could take an estate.

The Irish act did not intend to give a perfect title upon the register, otherwise they would have enforced the registry of wills. From the words and intention of the act, it appears that it applies only to cases of conveyance from the same person.

It is said, that the fifth section is independent of the fourth; and, having no restriction, invalidates all deeds. The intention of the fifth section was, that as the third and fourth give priority to deeds according to registration, but omit judgments, the difficulty which might arise from such omission should be remedied, and it gives priority to judgments over unregistered deeds; that is, if there be an unregistered deed, and it be postponed by a registered deed, judgments also shall be let in against the unregistered deed, which cures the anomaly which would otherwise occur.

The real argument of the Defendants in error

\* See the cases of devise and conveyance by the heir put in the judgment in the Court below, by Lord Plunkett. 1 Hudson and Brooke, 680, *et seq.*

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is, that words must be introduced to apply to an estate which a man might have had, if somebody else had not done an act.

The cases on this act are, *Jack d. Rennick v. Armstrong*, and *Fury v. Smith*.<sup>\*</sup> The point in the first case was determined in the same way in England—that if A. conveys to B. by an unregistered deed, then to C. in the same way, and C. conveys by a registered deed to D., D.'s registered deed will not prevail over B.'s unregistered deed. In the second case, which is yet more material, a purchaser by a registered deed from the sheriff was held not to give priority over an unregistered deed.<sup>†</sup>

The clear construction of the act is, that the fourth and fifth sections are to be read as one clause, the fifth only giving priority to judgments: that the act is to be construed according to Lord Redesdale's view, and not to be extended further.

For the Defendants in error.

The case in the Court below was argued upon the fourth and fifth sections of the registry act.

Two new points are made in the argument here.

The question is, whether if an assignment is made by an unmarried woman, and she afterwards marry, and then her husband assign, the registered deed of the husband will not defeat the unregistered deed of the wife.

One new point is, whether non-registration of the common title is material. Where the title is

\* See Appendix to 1. Hudson and Brooke.

† See Hudson and Brooke in principal case, 677. 711. & 717.

common, the registration is immaterial. When they become distinct, it is material. In *Jack v. Armstrong*, registration was held necessary to give title.

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The special verdict finds nothing affirmatively or negatively as to the registration of the common title; and, in the absence of proof, nothing is to be inferred. As in case of an annuity deed; if the memorial is not stated in pleading, the objection must be brought forward by the party impeaching the deed.

The deeds in conflict are those of 1779 and 1800; the first is unregistered, the second is registered. It is argued, that the interest of Warburton the husband was not legal, but equitable. This is true in one sense, but not applicable to the question. The question here is, what was his power to render the deed of 1779 inoperative. This depends upon the construction of the fourth and fifth sections of the registry act of Ireland, 6 Ann. c. 2.

The principle of the law is laid down by Lord Redesdale, in *Latouche v. Lord Dunsany*\*, as applied to the doctrine of tacking, that the registry was intended principally for the security of purchasers. The fourth section gives validity to registered deeds, according to priority of the time of registration. Doubts upon this question were first raised in *Fury v. Smith*; but that case hardly required the discussion of the point in question, and the opinion of Bushe C.J. in that case was extrajudicial. The section is supposed to apply to deeds executed by the same grantor.

\* 1 S. & L. 157.



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That ground is taken by the Judges ; and that is the point now in discussion as to the fourth section. It is argued, that the subsequent deed being first registered would be valid, if executed by wife ; but not so, if executed by the husband. But there is no such limitation in the section, nor to be inferred from its language, which is large enough to reach deeds executed by different individuals. There is nothing in policy or principle so to restrict the meaning. The policy of the registry act is to prevent secret conveyances, to the prejudice of purchasers. It is a remedial law, and it is the duty of courts of justice to promote this policy, and advance the remedy. It is argued, that the act does not provide for every case ; that wills are excepted ; and, therefore, it is to be presumed that exceptions were intended : that titles by operation of law not being within the act, it is expedient to enlarge the exception at the expense of the rule, and the policy of the act.

It was, probably, accidental that the case of wills was omitted in the provisions of the act.

The statute, in the first and third sections, gives an election to register wills ; and other provisions as to wills are made in other sections. If no loss was to follow the non-registration, the clauses were useless. By the eighteenth section it is provided, that, in case of impediment, devisees registering a memorial six months after the attainment of the will, &c. it shall be sufficient. Sufficient for what, if no forfeiture, loss, or inconvenience is to follow the non-registration ?

*Sugden.* It was copied by mistake from the English act.

*Knight.* If it was copied, there is reason to

suppose that it was intended to compel the registry of wills.

The remedy was intended to be applied to instruments which might be concealed, to the prejudice of purchasers. How is the mischief less, when the deeds are executed by different persons? Suppose after the death of father, tenant for life, the remainder of a term devolves upon a wife, being under coverture. Husband and wife convey by registered deed. After death of the wife, there is a conveyance by the husband by unregistered deed. Is that to prevail?

Marriage makes no difference, but vesting the legal right in husband. The argument is, that the statute does not apply to all cases, therefore it is not inexpedient to extend the exception to this. The deed of the husband is, in such cases, that of the wife. Suppose a covenant by the husband against acts of the wife, the act of the husband would be a breach of the covenant.

This construction of the act was never contended for before the year 1822. In *Bushell v. Bushell*\* the case of ancestor and heir occurred. The point in that case was upon a question of notice; but the point now taken was not suggested: whereas the point, if valid, would at once have put an end to the case.

Great inconveniences have been suggested if the construction for which we contend be admitted, cases of many successive descents, cases of persons out of possession; but those who use the argument forget that the registry act never makes a bad deed good. *Underdown v. Lord Courtown*.†

Reverting to the point that the deeds must be

\* 1 Sch. & Lef. p. 90.

† 2 Sch. & Lef. 41.

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executed by the same hand, many cases may be put ; as, suppose the first deed had been executed by the wife before marriage, and then the husband had died, and then the wife executes another deed. So, if there is no assignment before marriage, but an assignment by the husband during the marriage, and then he dies and the wife assigns. So, if A. B. assigns to C. D., who assigns to H., and then to E. F. ; A. B. dying, and appointing C. D. his executor. So in the case of joint tenants : if one assigns, and the assignee does not register, and then the survivor assigns the whole ; in that case, it is not the same hand that executes both conveyances, as far as one moiety is concerned. So, if the husband conveys an estate for his life, and then husband and wife join in a fine. The words "right, title, and interest \*," mean such right, &c. as the person had to make a conveyance.

As to the fifth section, it is not necessary for case of Defendant in error.

By the Appellants aid is borrowed from the fourth section to give construction to the fifth ; but the language of the fifth section is clear and decisive.

It is argued that it is only intended to apply to judgments ; but how can the word, "deeds," &c. be struck out ? That would be to repeal, not to expound, the statute. The case is within the words and the mischief of the statute, why not within the operation ?

As to the cases cited, *Jack v. Armstrong* has no bearing on the question : it is a mere repetition of *Honeycomb v. Waldron* †, and decides only that registration by an assignee of an unregistered deed

\* See 1 Sch. & Lef. p. 159.

† *Strange*, 1064.

is immaterial. As to *Fury v. Smith*, it is not so clearly distinguishable; but this is in substance an appeal from that decision. That case is not law, but may be supported consistently with this. It was there held that the execution was good; because the party had assigned away all right, and the decision proceeded on the ground that the sheriff can take nothing but what the party has. If, however, the decisions are inconsistent, the House must decide between them.

In reply. It may be admitted that the necessity of registration does not arise until there is a conflict of title. Here, both Plaintiff in error, and Defendant in error, claim under unregistered deeds. The question then is, to which priority is to be given. Surely to that which gives the legal title independently of the registry act.

As to the objection that the fact does not appear on the pleading, we are here upon a special verdict, by which it appears that the deed is not registered. If so, the registry act leaves the question still open. A party not claiming under a registered deed cannot claim against a legal title. The act does not enable parties in these circumstances to claim under unregistered instruments: the act only gives priority to registered instruments. The legal title was in the trustees in 1779. During the argument an assignment might be made to third persons, which would create an intermediate title. If there is doubt, it must operate in favour of the Plaintiff in error; for, independently of the act, he has a good title; he is a *bonâ fide* purchaser for valuable consideration. Something must be found in the act to take away the right.

It is said to be admitted, that this opinion was

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never entertained before 1822. But the Judges in court below only say, that the point never arose until the case of *Fury v. Smith* was before the court.

The question is, whether the rule is to be confined to conveyances by the same person. As to the 18th section, it is against the argument for the Defendant in error. It appears from the 2d and 3d Anne, that the Irish act was copied *verbatim* from the English. The first clause in the English act makes devises not registered void, as against purchasers. The only rational hypothesis is, that the Irish act, as originally drawn, was the same as the English, but that afterwards parts were struck out.

By the acts, English as well as Irish, all parties by the general enactments are bound to enroll deeds, and the enrolment gives to them a certain operation extending to covenant for title. The words "grant," &c. have been held to operate as covenants by enrolment without express covenants.

It has been held that registration, by election, does not operate as notice. There is a marked distinction between the English and Irish acts. Under the former, if A. executes by unregistered instrument to B. and then devises, the question is not decided how it would operate. If a will is not registered, the estate, it seems, would descend, and might defeat the devise. The words of the act are, "unless memorial," &c. The operation of the Irish act is the other way. In the case put, the heir at law could not defeat the devise. A purchaser, therefore, might be defeated by a devise not registered. If A. sells by unregistered deed in Ireland and then devises, and the heir sells by registered deed, that would be inoperative.

If the construction of the Plaintiff in error is adopted, all difficulties are removed; none can occur. If that of the Defendant in error is taken, the law is involved in difficulties innumerable.

The doctrine of *Fury v. Smith* is unobjectionable. If A. conveys to B., by unregistered deed, it is good between them. The conflict arises on subsequent deeds registered. But the estate must be vested before the right can be given. Here the wife had parted with the estate before marriage. The husband, therefore, had no interest.

The act could not intend to give an estate to a person who had it not. Cases may be put of a conveyance by an heir, or the heir of an heir, and it may be asked, where is it to stop? The answer, it is said, is furnished by *Underwood v. Lord Courtown*, that this cannot be done where the party is out of possession. But the case is not rightly understood. Suppose a conveyance by a grandson and no registered instrument appears, they must argue that it is good.

The case of *Bushel v. Bushel*\* turned upon notice. As to the case put of joint tenancy, by the assignment the tenancy would be severed; there could be no survivorship. The question, then, would not arise. The registry being good against parties conveying, must operate to sever the joint tenancy.

As to the other case put of husband and wife, there is nothing in the act to prevent a party from selling what he has. The husband may sell his life interest. Husband and wife may, by lawful conveyance, sell the inheritance if they have it; but the estate passes out of the wife.

\* 1 Sch. & Lef. 99.

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The question cannot depend on the fifth section of the act alone ; but on the joint operation of the two sections, the fourth and the fifth, which cannot be separated.

The question is, what is the meaning of the words in the fifth section, "right, title," &c. is it of what they *had* or *might have had* ?

Lord Redesdale in *Latouche v. Lord Dunsany*\*, decides that it is only as to what they *had* : and this construction was recognised by Lord Plunket in the decision of this case.

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Lord Tenterden, at the conclusion of the argument, said, that the case when argued in the court below was considered as one of great doubt ; the Judges in Ireland being equally divided upon the question. Under these circumstances, he said, it would be right to put questions to the Judges on the point of law ; and that until their answer should be received, he should abstain from intimating any opinion upon the subject.

Lord Tenterden then stated the question to be proposed to the Judges, in which it was alleged that the assignment of the lease was not registered ; when Mr. Knight, from the bar, submitted that the fact was not so found in the special verdict. Lord Tenterden thought that the non-registration must be assumed from the absence of recital that it was registered. But upon a suggestion that it might turn out that it was registered, and after consultation, another question to the Judges was added, in which the registration of the assignment was supposed.

\* 1 Sch. & Lef. 187.

The statement and questions put to the Judges were as follows.

An unmarried woman being possessed of land in Ireland for a long term of years, and about to marry, assigned the term by a deed, executed also by the intended husband, to trustees, upon trust, to permit the husband, after marriage, to receive the rents for life, then to the wife for life, then to the first son of the marriage, if any, with remainder over. The marriage took effect; the husband entered into possession, and received the rents and profits, and then made a lease for years for part of the term, rendering rent; the lessees entered and received the rents and profits, and then assigned the lease for a valuable consideration.

The marriage settlement was not registered. The lease by the husband was registered. The assignment of the lease is supposed not to have been registered.

The wife surviving her husband, obtained possession of the land. The assignees of the lease brought an ejectment against her to recover the possession.

Upon this statement two questions were put, regard being had to the true construction of the Irish Register Act, 6 Anne, chap. 2.

1. Which title is to be preferred, that of the assignees of the lease, or of the widow or the trustees under the settlement?

2. Supposing the assignment of the lease to have been registered, will the construction be the same?

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The Judges having requested time to deliberate upon the case, the following statement was, in

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Upon the first of these questions, the Judges who have heard the argument at your Lordships' bar are of opinion, that regard being had to the true construction of the Irish Register Act, the title of the assignees of the lease, under the circumstances above stated, is to be preferred to that of the widow, and also to that of the trustees under the settlement. Upon the second question, they are of opinion, that supposing the assignment of the lease to have been registered, the construction of the statute remains the same.

Upon the facts of this case, Mr. Warburton, who granted the lease of 1800, was at the time of granting it in possession of the premises; and, as the marriage settlement of 1779 was never put upon the register, he must have appeared to the public, and amongst the rest to the lessees, taking under the lease of 1800, to be in possession of the premises either in his own right or in right of his wife; in either of which cases he would have had the undoubted right to grant a valid term by the lease of 1800, unless the unregistered settlement of 1779 stands in the way. Now it is not disputed on the part of the Plaintiff in error, that if Mr. Warburton had been the party who conveyed the term by the unregistered settlement of 1779, and had afterwards made the lease which was registered, such lessees being purchasers for a valuable consideration, might have availed themselves of the fifth section of the Registry Act, and that the prior settlement would have been held fraudu-

lent and void as against the lease. Such a case is admitted to fall within the letter as well as the spirit of the act; but it is contended by the Plaintiff in error, that the operation of the Irish Registry Act extends no further, but is confined to cases in which both the earlier and the subsequent conveyances are the deeds of the same grantor; and whether such is the case, or on the contrary the act extends to give a preference to the subsequent deed when registered, against the prior unregistered deed, notwithstanding the same was executed by a former owner of the estate, is, in substance, the question now proposed for our consideration.

No case can be found either upon the English registry acts, or upon the Irish act now under consideration, in which this precise question has been decided by a court of law. It must therefore be determined upon principle, not upon authority; and the only principle of decision that is applicable to it, is the just construction of the statute itself, to be made out by a careful examination of the terms in which it is framed, and by a reference, in all cases where a doubt arises, to the object which the legislature had in view when the statute was passed. Where the language of the act is clear and explicit, we must give effect to it, whatever may be the consequences; for in that case, the words of the statute speak the intention of the legislature. If in any case a doubt arises upon the words themselves, we must endeavour to solve that doubt by discovering the object which the legislature intended to accomplish by passing the act.

And although it would be impossible to consider a question to be free from difficulty, where opinions

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have been formed upon it in direct contradiction to each other, and each opinion has been supported with such acuteness and ability by the very learned Judges of the several Courts below, before which it has been agitated ; yet we have, upon consideration, come to the conclusion, that both the closer interpretation of the words of the statute, and the construction which, at the same time, most suppresses the mischief the legislature had in view, and most advances the remedy which is held forth, warrant us in the opinion, that the registered lease of 1800 is to be preferred to the unregistered marriage settlement of 1779 ; and that the latter, in so far as its provisions are inconsistent with the validity of the lease, is to be held altogether void.

The question appears to turn almost entirely on the construction of the fifth section of the statute, which declares in what cases, and under what circumstances, an unregistered deed shall be void. For as to the fourth section, to which considerable importance has been attached in the course of the argument, it appears to us to be confined to the case of priority of registered deeds as between themselves, and to have very little, if any, bearing upon the question immediately under discussion.

Before, however, we come to the more particular consideration of the fifth section, it will be advisable to look generally at the preamble of the statute, and the other clauses which precede the fifth, in order that we may ascertain from the act itself, the object and general intention of the legislature in passing it ; for such intention is to be the guide of our course, in case any difficulty should arise in the construction of a particular clause.

This statute, which was passed by the Irish parliament, in the sixth year of Queen Anne, is entitled "An act for the public registering of *all* deeds, conveyances, and wills, that shall be made of any lands, tenements, or hereditaments." It begins by stating its object to be, "for securing purchasers, preventing forgeries and fraudulent gifts and conveyances of lands, tenements, and hereditaments, which have been frequently practised in this kingdom, especially by Papists, to the great prejudice of the Protestant interests thereof; and for settling and establishing a certain method, with proper rules and directions, for registering a memorial of *all* deeds and conveyances, which from and after the 25th day of March, 1708, shall be made and executed for or concerning any honours, &c. in this kingdom, and of all wills and devises in writing, &c.;" and it then proceeds, in the first section, to enact, that a public office for registering memorials of deeds and conveyances, wills and devises, shall be established and kept in the city of Dublin, to be managed and executed by a fit and able person, &c.

The first section, therefore, of the act is framed in the most general and comprehensive terms, comprising "*all* deeds and conveyances for or concerning any lands," without restriction or qualification as to the parties by whom such deeds or conveyances were executed or otherwise; showing the intention of the legislature to have been to provide, in the place and stead of the ancient and more public and notorious mode of transferring landed property, the means of discovering all transfers with equal or greater certainty, by re-

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ferring to a public register; upon the face of which, it was intended, they should all be found.

The third section directs, that a memorial of all deeds and conveyances, which from and after the 25th day of March, 1708, shall be made, for or concerning, or whereby any honours, &c. within this kingdom may be anywise affected, may, at the election of the party or parties concerned, be registered in such manner as is hereinafter directed.

There is nothing, therefore, in the language of this third section, which restrains the generality of the first. It is still a memorial of *all* deeds and conveyances which the legislature contemplates; although it is left open to the discretion of the parties to whom the conveyances are made, whether they will avail themselves of the protection of the act, or incur the consequences to which they become liable, by neglecting its provisions.

What those consequences are, the fourth and fifth sections proceed to declare:—

For by the fourth section it is enacted, “That  
 “every such deed or conveyance, a memorial  
 “whereof shall be duly registered, shall be deemed  
 “and taken as good and effectual both in law  
 “and equity, according to the priority of time of  
 “registering such memorial, according to the right,  
 “title, and interest of the person or persons so  
 “conveying such honours, &c. against all and  
 “every other deed, conveyance, or disposition of  
 “the honours, &c. comprised or contained in any  
 “such memorial as aforesaid.”

This clause is framed for the purpose of regulating the priorities of registered deeds and con-

veyances *as between themselves*, and is expressed in the same general terms as the preceding.

It begins by enacting, "That *every such* deed "or conveyance," that is, every deed or conveyance executed after the 25th March, 1708, affecting lands, &c. in Ireland: an expression unlimited and unqualified by any reference to the persons executing such deeds; neither requiring nor appearing to require, that the party who executes must claim under a registered conveyance, or importing any other restriction. The statute then enacts, "that it shall be good and sufficient according to "the priority of time of registering such memorial, "against *all and every* deed; conveyance, or disposition of the honours," &c. Words equally unlimited, and unqualified by any consideration, whether the person executing such prior deed was or was not the same person who executed the second; whether the person executing the second deed claims under a registered conveyance; whether he is seised or possessed *proprio jure*, or is in under a title which is come to him by act or operation of law.

We do not see how we can give full force to the expression used by the legislature in this section, unless we adopt a construction as large as the language itself. If it had been the intention of the legislature, that the priority between deeds should take place according to the time of their registration, only where both the first and the second deed were executed by the same person, it surely would have been easy to have expressed this by words to that effect; but there is no expression in the fourth section, which imports such a restriction, and we think we should be legislating, not

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interpreting, if we were to imply such words of our own authority.

The fifth section, the section upon which the present questions turn, state the effect of registration as between unregistered and registered deeds, in the following terms: — “ *Every* deed or conveyance not registered, of all or any of the honours, &c. comprised or contained in such a deed or conveyance, a memorial whereof shall be registered in pursuance of this act, shall be deemed and adjudged as fraudulent and void, not only against such a deed or conveyance registered as aforesaid, but likewise against all and every creditor and creditors, by judgment, recognizance, statute merchant, or of the staple, confessed, acknowledged, or entered into, as for or concerning all or any of the honours, &c. contained or expressed in such memorial, registered as aforesaid.” Now in this clause also, as in the former, the expression is general, “ every deed ;” and is altogether unqualified by any reference to the description of the party by whom the unregistered deed is executed, whether he be the same who executed the registered deed, or another and a different person.

The same observation, therefore, occurs upon the fifth, which has already been made upon the fourth section; viz. if the legislature intended the unregistered deed to be void against a registered deed, in such case only where both were executed by the same party, so important a qualification would scarcely have been omitted in the act itself, or left to be supplied by interpretation in a court of law.

From this general view, therefore, both of the

preamble and the five first clauses of the statute, we think it cannot be doubted but that the statute meant to afford an effectual remedy against the mischief arising to purchasers for a valuable consideration, from the subsequent discovery of secret or concealed conveyances, or secret or concealed charges upon the estate. Now it is obvious, that no more effectual remedy can be devised than by requiring, that *every* deed by which any interest in lands or tenements is transferred, or any charge created thereon, shall be put upon the register, under the peril that if it is not found thereon, the subsequent purchaser for a valuable consideration, and *without notice*, shall gain the priority over the former conveyance, by the earlier registration of the subsequent deed.

If the words of the fifth section will bear this construction, it is to be preferred to that which limits the operation of the clause to those cases only where both the conveyances are the deeds of the same man. For in the latter case, the remedy is obviously incomplete. The mischief to the purchaser is the same, whether the secret conveyance or charge arises from the deed of his immediate grantor, or that of a former owner of the estate. If the words of the statute will comprehend both, why is he to be protected against the secret deed in the one case, and not in the other? What just ground of complaint can be urged against such a construction by the grantee under the unregistered deed, executed by a former owner of the estate? The deed, if it was a real and a *bonâ fide* transaction, must have been, or ought to have been, in his custody or power from the time of its delivery : — what cause can be assigned for its non-appearance

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upon the register, except either collusion with the grantor, or carelessness and neglect in himself, or mere accident? In neither case can he complain of the construction of a statute, by which his own fraud, or his own want of due caution, or an accident which befel himself, is not allowed to operate to the prejudice of the rights of the more diligent purchaser. Suppose a man to settle his property upon his youngest son's marriage, on himself for life; remainder to his eldest son for life; remainder to the youngest son, his wife and children, in strict settlement; remainder over in fee; the settlement is not registered, and the settler dies. His eldest son enters, and, supposing himself to have the fee, conveys to a purchaser for a valuable consideration. Shall it be allowed, that the younger son, his widow, or his children, shall enter, and evict the purchaser? Or, suppose a like settlement, and a like concealment, and the father devises all his lands in trust to sell, and to apply the money to debts and portions, or other purposes. After the estate is sold, and the money distributed, can the construction of this act be such, that the purchaser shall be turned out by the claimants under the settlement? Or, in the particular case now before us, where Mrs. Warburton, before her marriage, might have registered the deed; and the trustees, after the marriage, were bound in duty to do so, if the settlement came to their knowledge; can the proper construction of this act allow Mrs. Warburton to avail herself of her own carelessness, of the breach of duty of her trustees, by establishing her unregistered deed against the registered lease, made by her husband, upon no other ground than that

the settlement and the lease were not conveyances by the same person? If there was no provision in the act to prevent this inconvenience, it must be submitted to through necessity; but if there are words in the act capable of such an interpretation as would prevent the inconvenience, we think ourselves bound upon every consideration to give them such an effect. How much more, then, where the words themselves, and their strict grammatical construction, appear to require such a sense? That in all the cases above supposed, a great injustice would be worked, if the act supplied no remedy, no one can deny. It appears to us, that to allow the act to authorise such mischiefs, would not only be injustice, but would be against law. The language of the act throughout, and more particularly in the fifth section, seems to establish *this* to have been its leading object; that as far as deeds were concerned, the registry should give complete information; and that any necessity of looking further for deeds than into the register itself, should be superseded: and it is manifest that no construction of the act is so well calculated to carry into effect this, its avowed object, as that which forces all transfers and dispositions of every kind, and by whomsoever made, to appear upon the face of the register, so as to be open to the inspection of all parties who may at any time claim an interest therein.

But the general rules of construction, which have been established from the earliest times, require a large and liberal interpretation, of any provision made for the suppression of fraud. In *Heyden's Case*, 3 Rep. 7., the Barons of the Exchequer resolve, that the construction of the

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statute, then under consideration before them, must be made, "by enquiring what was the mis-  
 " chief and defect against which the common law  
 " did not provide; what remedy the Parliament  
 " had appointed to cure the disease of the com-  
 " monwealth; and what was the true reason of  
 " the remedy:" and the observation which follows  
 in the report, is one that ought never to be lost  
 sight of in any case, and is peculiarly applicable to  
 the present, namely, "that the office of all the  
 " Judges is always to make such construction as  
 " shall suppress the mischief and advance the  
 " remedy, and to suppress subtle inventions and  
 " evasions for continuance of the mischief, and  
 " *pro privato commodo*; and to add force and life  
 " to the cure and remedy, according to the true  
 " intent of the makers of the act, *pro bono*  
 " *publico*."

This principle of construction has always been  
 adopted by courts of justice. Thus, where the  
 statute of Marlbridge, c. 6., provides that a *feoff-*  
*ment* to the heir, to defraud the lord of ward,  
 &c., shall be void, the statute is held not to be  
 confined to the case of a *feoffment*, but to extend  
 to a grant, fine, recovery, lease, and release, con-  
 firmation, or other conveyance. Thus again,  
 where the statute of fraudulent gifts, 27 Eliz. c. 4.,  
 enacts, "that every conveyance of any lands, &c.,  
 " for the intent and purpose to defeat and deceive  
 " such persons as have purchased or shall purchase  
 " the same lands, shall be deemed, only against  
 " such purchaser, to be void, frustrate, and of  
 " none effect;" it was resolved in *Burrell's Case*,  
 6 Co. 72., that the remedy was not confined to  
 cases where the first and second conveyances were

*made by the same person*; but that if the "father  
 "makes a lease by fraud and covin of his land  
 "to defraud others to whom he shall demise or  
 "sell it (as all fraudulent leases should be so in-  
 "tended); and before the father sells, or demises  
 "it, he dies; and the son knowing, or not know-  
 "ing of the said lease, sells the land on good con-  
 "sideration; in that case the vendee shall avoid  
 "that lease by the said act." And it is afterwards  
 observed, "it is not necessary that he who sells  
 "the land should make the former fraudulent  
 "estate or incumbrance; but be the estate, &c.,  
 "fraudulent, whosoever makes it, the purchaser  
 "shall avoid such fraudulent estate." And Lord  
 Coke adds to his report of the case, "That when  
 "he acquainted Popham C. J. with that resolution,  
 "he allowed well of it, and said it was well done  
 "to construe the said act in suppression of fraud."


The decision in *Burrell's Case*, which is last referred to, appears highly important in a double point of view; in the first place, as confirming and fortifying the general rule of construction above laid down; and in the next place, as having a direct bearing upon and application to the proper construction of the fifth section of the Irish Registry Act. For the act against fraudulent conveyances, and the Irish Registry Act, have the same object in view: the mischiefs to be remedied in both are to a great degree the same; namely, the frauds practised by grantors against purchasers for value: the remedy applied by both is the same also, namely, the making the former deed void against the latter; and between the terms of the clause in each, by which the former deed is avoided, there is almost an exact and complete agreement in the

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terms used by the legislature. When, therefore, we find the Judges deciding in the case under the statute of Elizabeth, that the statute shall apply, although the fraudulent estate and the *bonâ fide* lease are not made by the same person, it affords the strongest authority that can be furnished by analogy, that the same ought to be the construction of the clause now under discussion.

It has been urged in answer to this construction of the fifth section, that it is not to be taken by itself alone, but in conjunction with the fourth section, of which it is contended, that one object was, to control and qualify the operation of the next following clause. And it is further urged, that as the fourth section, in declaring the effect and operation of registered conveyances, *inter se*, gives efficacy to the first registered deed in preference to the second, not absolutely, but only "according to the right, title, and interest of the person conveying," a similar restriction must be understood to be imported into the fifth section also; and that the enactment, which avoids altogether the prior unregistered deed, as against the subsequent deed which is put upon the register, must be understood with this tacit restriction, "according to the right, title, and interest of the grantor in the second deed." The meaning of those restrictive words in the fourth section, appears to be, "according to what *would have been* the right, title, and interest of the person making the second conveyance, had there been no deed but what appears upon the register." For, unless this be the meaning of those words in the fourth section, that clause of the statute affords no protection at all. The clause, therefore, so under-

stood, enacts in effect, that every man who first registers his conveyance, where there is no other objection to the grantor's right to convey except a prior conveyance made by himself, and unregistered, shall be preferred to the man who registers at a subsequent time the conveyance so made to him. This construction, on the one hand, excludes from the protection of the fourth section the grantee who has registered a conveyance made to him by a perfect stranger to the estate; and, on the other hand, includes within its protection, as between two grantees, that one who first registers his conveyance made by the owner of the estate. To apply which construction to the facts of the present case, the husband, but for the unregistered marriage settlement, would have had the right and title to have made the lease of 1800. For when he married, the residue of the term of 999 years would have belonged to the wife's father for life, remainder to the wife. Now when the father died (as he did before the making of the lease of 1800), the term would have vested in the husband in right of his wife, with full power in him alone to dispose of it. At the time, therefore, that the lease of 1800 was made, it would have been a good and valid lease, but for the unregistered settlement of 1779. The case, therefore, of these lessees, if there had been a subsequent registration of the marriage settlement, would have been argued upon the fourth section; and upon that section the lessees would, as it appears to us, have been entitled to the preference before any who claim under the marriage settlement.

But it is urged, that the fifth section is to be construed as if subject to the same condition.

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Even admitting that such should be the case, and incorporating that condition into the fifth section, it would still seem that the unregistered settlement is to be held void against the registered lease; the latter being a lease granted by a person who would in all other respects, except so far as relates to the prior unregistered settlement, have had right and title to grant the lease. But, after all, why is the clear intelligible language of the fifth section to be controlled by the more ambiguous language of the fourth? No rule of construction can require, that when the words of one part of a statute convey a clear meaning according to their strict grammatical construction, a meaning which best advances the remedy, and suppresses the mischief, aimed at by the legislature, it shall be necessary to introduce another part of the statute which speaks with less perspicuity, and of which the words may be capable of such construction, as by possibility to diminish the efficacy of the other provisions of the act.

It has been further argued, that the effect of the marriage settlement was, to prevent the husband from having any right to grant the lease of 1800 at the time when it was made; for that the wife's right was effectually conveyed as between her husband and herself, by the deed of 1779; that she had no interest in her at the time she married; that she could, therefore, pass no interest to her husband by the marriage; that the husband, consequently, never had any right, and, therefore, could convey none to the lessee.

Now, it may be admitted, that as against the husband, who was party to the deed of 1779, that deed was valid; it may be admitted, also, that he could not, of right, exercise any powers over the

property inconsistent with that deed; but, as by the non-registration of that deed, the grantees suffered him to have the appearance of right to the world at large, neither they, nor any claiming under them, are at liberty to set up the deed in opposition to the persons who have been deluded by the appearance of right in the husband. This argument, therefore, which would be good against the husband himself, cannot be heard from the parties claiming under the settlement, against his grantee for a valuable consideration.

It is further urged in argument, that the Irish registry act never intended the register to contain a perfect history of the title, for that devises are not required to be registered by that act; and that, therefore, the conveyance by the heir, although registered, may always be set aside by the devisee claiming under a will concealed, or subsequently discovered. It must be admitted that such is the necessary construction of the act, and it is to be regretted that it is defective in that particular. But surely that defect affords no argument for so construing it in another of its provisions, as to make it efficacious against a former unregistered conveyance. If the act does not go far enough, at least the interpretation of a court of law should make it perfect as far as its enactments extend.

One objection taken in argument, to the right of the Plaintiff below to recover in ejectment, has been, that he takes no legal interest in the premises. It has been asked, to whom does the rent reserved by this lease belong, and by whom could it be recovered? It should be observed, that the same difficulty would have occurred, and the same questions might have arisen, had both the deeds

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been executed by the Plaintiff in error, and had the first deed been for any other purposes, and without any trust in favour of the wife. The first deed, the unregistered deed, would, as between her and the trustees, have effectually vested all her interest in the trustees; and she would have had no right, or title, or interest in herself: she would have had nothing *of her own* to convey: and though her conveyance would, by force of the register act, have passed a good and valid legal estate to her lessee, she never would have been capable of taking the rent reserved upon it to her own use. How the rent would have been recoverable in either case, it is not necessary now to say; it is sufficient, that as against the unregistered settlement, the lease conveyed the legal interest to the lessee.

Upon the whole, therefore, upon the first question submitted to us, we think the title of the assignees of the lease is to be preferred to that of the widow, or that of the trustees.

Upon the second question, after the full discussion of the principle on which we have arrived at the former opinion, it will be sufficient to say, we think the neglect to register the assignment of the lease does not invalidate the claim of the assignees, because the unregistered assignment passed the interest in the lease as between the lessee and the assignee, and there is no conflicting claimant under a registered deed.

In accordance with the opinion of the Judges thus delivered, and without further observation, Lord Tenterden, expressing his concurrence in the opinion, moved that the judgment below should be affirmed.

Judgment affirmed.

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(EXCHEQUER CHAMBER.)

JOHN DOE on the several De-  
mises of FRANCIS HEARLE,  
and ANNA MARIA HEARLE,  
his wife, and of the said  
FRANCIS HEARLE - - - } *Plaintiff in Error.*

SUSANNA JEMIMA HICKS - *Defendant in Error.*

J. H. by his will demised a copyhold mansion-house and pleasure-grounds, &c. at P. where he resided, to trustees in trust for his wife during her life or widowhood; and, upon her decease or second marriage, &c. upon such trusts, &c. as should best correspond with the uses, &c. therein-after declared, concerning the residue of his real estates, &c.; and he thereby bequeathed to his wife his plate, furniture, &c. The residue of his real estate he gave in trust for his son, and the issue of his son, in the usual course of settlement; and he thereby charged upon the residue a rent or annuity of 300*l.* a year for his wife during her life, with a contingent increase of 100*l.* per annum in case of the failure of the issue of his son. By a first codicil, which was made after the death of the son without issue, he revoked the bequest of the plate, furniture, &c., and in place thereof bequeathed to his wife for her own use all his farming stock, household goods, and all other his effects, in and about his residence at P.; and he thereby also gave to his wife absolutely, an additional annuity of 100*l.* per annum; and he bequeathed to her the residue of his personal estate for her own use. By a second codicil he made her sole executrix and residuary legatee. By a third codicil he gave to his wife the proceeds and profits of five shares which he held in the County Fire Office for her life. On the 14th of Sept. 1822, the testator made a fourth codicil to his will as follows: — “I do make and add this further codicil to my will, hereby revoking and making null and void several of the dispositions heretofore made by me, in my said will and codicils, of my freehold, copyhold, and

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personal estate and effects of all and every kind and description : and instead, and in the place of such devise, disposition, and bequest thereof, I do give, devise, and bequeath all and every my freehold, copyhold, and personal estate and effects of every kind and description whatsoever situated, unto my daughter, Anna Maria Hearle ; and from and after the determination of that estate, I give, devise, and bequeath the same unto my grandson, John Graves, and his heirs in strict entail, as in my said will directed, with this additional clause, especial and positive orders, that in case the said John Graves should not be thirty-one years of age at the time my said estates shall devolve on him by the death of my daughter, that he shall not take or be put in possession of the same until he shall have attained such age of thirty-one years, but that the rents and profits thereof shall accumulate and be in the hands of my trustees for the use and benefit of my said grandson and his heirs ; and in failure of issue of the said John Graves, I order that my said estates and effects shall go and descend as is by my said will directed ; and I do hereby ratify and confirm the several annuities and donations by me in my said will and former codicils given and bequeathed : and I do further give and bequeath unto my dear wife, Jemima, one other annuity of 100*l.*, to be paid to her in like manner, and with the like restrictions, as the former ones given her by my will and codicils, hereby in all other respects but what is above mentioned confirming my said will and codicils."

By a fifth codicil, dated on the 3d of July 1823, he gave to his wife and at her disposal all sums of money which she or the testator might be entitled to out of the effects of her late father, or that any other friend might leave her, and ordered his executors, in case she should die before him, to fulfil her will and disposal thereof. The testator died in 1825.

Held, upon ejectment and special verdict, that the clause of revocation contained in the fourth codicil did not apply to the devise to the wife of the copyhold and premises of P. with such clearness and certainty as to operate as a revocation of the explicit devise of those premises contained in the will.

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**T**HIS case arose out of an ejectment brought in the Court of Exchequer, in Hilary Term 1826, for the recovery of a copyhold, or customary mes-

suage, or tenement and farm, called Plomer Hill House, with the appurtenances situate within, and being parcel of the manor of West Wycombe, in the county of Buckingham. The declaration contained several demises by Francis Hearle, and Anna Maria his wife, and by Francis Hearle alone; Susanna Jemima Hicks defended the ejectment, and pleaded the general issue. The cause was tried at Aylesbury, at the Spring assizes for 1826, before Holroyd J.

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The jury found a special verdict, stating in substance that John Hicks was, at the time of making his will, seised in fee of certain freehold lands in Cornwall thereafter mentioned, and of certain freehold lands and hereditaments in the county of Buckingham thereafter mentioned, and of a certain copyhold, messuage, or mansion-house, lands, and hereditaments, with the appurtenances, called Plomer Hill House, being the premises mentioned in the declaration; and that John Hicks, on the 4th day of May, 1821, duly made and published his will in writing, dated on that day, and executed and attested, so as to pass real estate, and which will (amongst other devises) contained the devise following:

In the first place, I give and devise all that my copyhold messuage or mansion-house, barns, stables, and buildings, pleasure-grounds, lands, and hereditaments called Plomer Hill House, in the parish of West Wycombe aforesaid, and now in my own occupation, together with the cottages, or tenements and premises thereunto belonging, with their appurtenances, unto and to the use of trustees therein named, their heirs and assigns; nevertheless upon the trusts following (that is to say) upon trust

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for my present dear wife, Susanna Jemima Hicks, during her life or widowhood, or until she shall cease to reside at the same premises, or let the same, or permit them to be occupied by any other person than herself, she paying all taxes and outgoings in respect thereof, and keeping the same in good and tenantable repair; and from and after the decease or second marriage of my said wife, or on her ceasing to reside at the said premises, or letting the same to, or permitting them to be occupied by any other person than herself, then, and in either or any of the said cases, and whichever of the said events shall first happen, my said trustees, their heirs and assigns, shall stand and be seised or possessed of the said copyhold hereditaments and premises, with the appurtenances, upon and for such trusts, intents, and purposes, and with, under, and subject to the (such) powers, provisoes, and declarations as (regard being had to the nature and quality of the tenure of the said copyhold premises) will best or nearest correspond with the uses, trusts, intents and purposes, powers, provisoes, and declarations hereinafter expressed and declared, of and concerning the residue of my real estates, or such and so many of them as shall be then existing undetermined and capable of taking effect. He thereby also gave to his wife an additional annuity of 100*l.* per annum, and bequeathed to her the residue of his personal estate for her own use. The residue of his real estate he gave in trust for his son, and the issue of his son, in the usual course of settlement; and he thereby charged upon that residue a rent or annuity of 300*l.* a year for his wife during her life, with a contingent increase of 100*l.* per annum in case of the failure of the issue of his son.

On the 10th May, 1822, the said John Hicks duly made and published a codicil, in writing, to his will, bearing date that day, and executed and attested so as to pass real estate. By this codicil he made his wife sole executrix and residuary legatee. In other respects it is not material to the point at issue.

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On the 15th July, 1822, John Hicks made and published a second codicil, in writing, to his will, bearing date the same day, but which was not executed so as to pass real estate. By this codicil he gave to his wife the proceeds and profits of five shares which he held in the County Fire Office, for her life. In other respects it is not material to the point at issue.

The said John Hicks, on the 18th of July, 1822, made and published a third codicil, in writing, to his will, bearing date the same day, but which was not executed so as to pass real estate. This codicil is not material to the point at issue.

On the 14th of September, 1822, John Hicks made and published a fourth codicil, in writing, to his will, which codicil was executed and attested so as to pass real estate, and was in the words and to the effect following, that is to say,

And I do make and add this further codicil to my will, hereby revoking and making null and void several of the dispositions heretofore made by me in my said will and codicils of all my freehold, copyhold, and personal estate and effects, of all and every kind and description; and instead and in the place of such devise, disposition, and bequest thereof, I do give, devise, and bequeath all and every my freehold, copyhold, and personal estate and effects, of every kind and description

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whatsoever and wheresoever situated, unto my daughter Anna Maria Hearle ; and from and after the determination of that estate, I give, devise, and bequeath the same unto my grandson John Graves, and his heirs in strict entail, as in my said will directed, with this additional clause, especial and positive orders, that in case the said John Graves should not be thirty-one years of age at the time my said estates shall devolve on him by the death of my daughter, that he shall not take or be put in possession of the same until he shall have attained such age of thirty-one years ; but that the rents and profits thereof shall accumulate and be in the hands of my trustees, for the use and benefit of my said grandson and his heirs ; and in failure of issue of the said John Graves, I order that my said estates and effects shall go and descend as is by my said will directed : and I do hereby ratify and confirm the several annuities and donations by me in my said will and former codicils given and bequeathed : and I do further give and bequeath unto my dear wife Jemima one other annuity of 100*l.*, to be paid her in like manner, and with the like restrictions, as the former ones given her by my will and codicils, hereby in all other respects, but what is above mentioned, confirming my said will and codicils.

In witness whereof I have to this my codicil put my hand and seal this 14th day of September 1822.

J. HICKS, L. S.

Signed, sealed, published, and declared by the said John Hicks, as and for a codicil to his last will and testament, in the presence of us who, as

witnesses thereof, have hereunto subscribed our names, in his presence, and in the presence of each other.

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JOHN TUGWELL	} Servants to me the said John Hicks.
WILLIAM STROUD	
CHANDOS JANES	

On the 3d of July, 1823, John Hicks made and published a fifth codicil in writing to his will, which was executed and attested so as to pass real estate. By this codicil he gave to his wife, and at her disposal, all sums of money which she or the testator might be intitled to out of the effects of her late father, or that any other friend might leave her; and thereby ordered his executors, in case she should die before him, to fulfil her will and disposal thereof. In other respects this codicil is not material to the point at issue.

The special verdict then proceeded to state in substance, that John Hicks died on the 21st day of June, 1825, seised of his said several estates, without revoking or adding to his will, except as appears by the codicils respectively, leaving his wife, the Defendant, and Anna Maria Hearle, one of the lessors of the Plaintiff, him surviving.

The special verdict then stated the lease to the nominal Plaintiff, his entry and possession, and the entry and ouster by the Defendant, and concludes by referring the matter of law to the Court in the usual manner.

The case was argued in the Court of Exchequer on the special verdict in Michaelmas term, 1826; and in Hilary term, 1827, the Court gave judgment for the Plaintiff.

In Easter term, 1827, the Defendant below



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brought a writ of error in the Exchequer Chamber. The case was argued before that Court in the following vacation; and in Trinity term, 1897, the Court reversed the judgment of the Court of Exchequer.

Against this judgment the writ of error was brought.

For the Plaintiff in error, *Sir E. Sugden* and *Mr. J. Wilson*.

By the introductory words in the fourth codicil, "hereby revoking, and making null and void, *several of the dispositions* heretofore made by me in my said will and codicils, of *all my* freehold, and *copyhold*, and personal estate and effects, of *all and every kind and description*," it is manifest that the testator intended to bring the whole of his copyhold estate, and consequently the mansion-house and lands called Plomer Hill House, within the scope and influence of that codicil, and of the alterations or substituted dispositions made by that codicil, whatever might be the nature or extent of those alterations or substituted dispositions.

The succeeding words in the fourth codicil, "and instead, and in the place of such devise, disposition, and bequest thereof, I do give, devise, and bequeath *all and every* my freehold, *copyhold*, and personal estate and effects, of every kind and description whatsoever, and wheresoever situated, unto my daughter, Anna Maria Hearle," carry in terms the most explicit and comprehensive, all the copyhold property which the testator was then entitled to. These words are words of present and immediate gift, and any construction which would postpone or suspend the benefit

or interest passing under them, would do violence to the plain and natural signification of the language of the codicil.

The Jury have found that the testator died seised of freehold estates in Cornwall, of certain other freehold estates, which are mentioned, and of the copyhold estate called Plomer Hill, and the finding is confirmed by the testator's description of his property in his will. Plomer Hill was the only copyhold estate of which the testator was seised. Hence the word "*copyhold*," in the fourth codicil, must of necessity have reference to the mansion and estate called Plomer Hill House, and to that property alone; and, therefore, the fourth codicil resolves itself into an express and specific revocation, and new devise of the Plomer Hill House estate.

The form of the gift over in the fourth codicil immediately following the devise and bequest to the testator's daughter, Anna Maria Hearle, and which gift over is in the following words, "and  
 "from and after the determination of that estate,  
 "I give, devise, and bequeath the same to my  
 "grandson John Graves, and his heirs, in strict  
 "intail, as in my said will directed, with this  
 "additional clause, special and positive orders,  
 "that in case the said John Graves should not be  
 "thirty-one years of age at the time my *said*  
 "*estates shall devolve on him by the death of my*  
 "*daughter*, that he shall not take, *or be put in*  
 "*possession* of the same, until he shall have at-  
 "tained the age of thirty-one years, but that the  
 "rents and profits thereof shall accumulate, and  
 "be in the hands of my trustees, for the use and  
 "benefit of my said grandson and his heirs,"

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shews clearly and obviously, that the death of Anna Maria Hearle, and that only, was the event and time on and at which the property was intended to be beneficially enjoyed by John Graves, the testator's grandson, or in the words of the testator, "should devolve on him;" but the construction, which would vest in the Defendant the first beneficial life estate, would be totally inconsistent with the design and purpose of the testator, because it would make the beneficial possessory interest of John Graves, or his trustees, depend not upon the death of Anna Maria Hearle, the single event specified by the testator, but upon the death of the survivor of her and the Defendant, the widow of the testator.

The construction here contended for, on behalf of the Plaintiff in error, is that construction which is alone consistent and reconcileable with the intention of the testator to effect a *partial alteration* in the dispositions of *all* his freehold and copyhold estates, as avowed by the introductory words in the fourth codicil, "hereby revoking and making " null and void *several* of the dispositions heretofore made by me in my said will and codicils, " *of all* my freehold and *copyhold* and personal " estate and effects, of all and every kind and " description." These words cannot, it is submitted, be satisfied, unless the copyhold mansion house and estate of Plomer Hill House be held within the influence and meaning of the fourth codicil. And it is a settled rule of law, that that construction is to be preferred which gives effect to every part of the will, so that each word may have its particular operation, and not be rejected if any construction can possibly be put upon it.

In the clause with which the fourth codicil concludes, the word "donation," coupled as it is with the term "annuity," and followed by the gift of another annuity, must be construed as signifying subjects or things *ejusdem generis*, that is, pecuniary benefits. If it should be construed as including or affecting the copyhold estate mentioned in the declaration, it must be held equally to include the whole real estate of the testator; the effect of such a construction would be simply to confirm and restore the will and former codicils, as far as respects the freehold and copyhold estate; making the language of this, the fourth codicil, senseless and repugnant. The word "donation," is more properly to be referred to the specific legacies given by the will and prior codicils, which would otherwise have been revoked by the bequest in the codicil of the personal estate to Mrs. Hearle.

By the form of the disposition of the tenement, called Treravel, in the first codicil, the testator has shown, that where his intention was to except a partial interest, previously given by his will, from the operation of the new disposition made by his codicil, he does so in express terms, which exclude all ambiguity.

For the Defendants in error

Mr. Serjeant *Russell* and Mr. *Patch*.

The word "several" at the beginning of the fourth codicil, which is applied to the dispositions of the freehold, copyhold, and personal estates indiscriminately, shows that the testator did not intend to revoke all the devises of any of those species of estates; and when he adds, "and instead and in the place of such devise, disposition, and bequest thereof, I give, devise, and

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“bequeath all and every my freehold, copyhold, and personal estate and effects of every kind whatsoever, and wheresoever situated, unto my daughter Anna Maria Hearle,” the words “such devise, disposition, and bequest” being used each in the singular number, and applied to all the testator’s freehold, copyhold, and personal estate and effects conjointly, show, that if, under the will and prior codicils, there is a time when, and a person in whom, all these species of estates are ever to vest and go together, the devise and disposition of each species of estate intended to be revoked, is the devise and disposition arising at that time, and given to that person. There are in the will such devises and dispositions of several parts of his property, and particularly as to the copyhold estate at Plomer Hill, arising at the decease or second marriage of his widow.

If the devise of the copyholds at Plomer Hill, to Susanna Jemima Hicks, were considered as revoked, it would follow, by parity of construction, that the limitations to the children of the daughter, Anna Maria Hearle, of the Treravel estate, must likewise be considered as revoked; which is an unnatural supposition, and would be a great hardship upon such children: and by parity of reasoning, the direction contained in the testator’s first codicil, as to the presentation of the living of Bradenshaw to his great-nephew, John Mountstevens, would be revoked, which would be contrary to the testator’s express intention, as declared in his first codicil.

The devises and bequests contained in the fourth codicil are intended as amplifications of the provisions for Susanna Jemima Hicks and Anna Maria Hearle, the adults, in exclusion of the grandson,

John Graves, the minor, whose majority the testator has further postponed until he attains thirty-one years of age.

The testator, confirming in his fourth codicil the annuities and *donations* by his will and former codicils given, confirms all the bequests of his personal estate; so that the words "all his personal estates and effects whatsoever," in the former part of this fourth codicil, must be taken in a qualified and limited sense; and hence it is to be inferred, that the testator did not intend to give such effect to any of the previous general words, as they argue for the Plaintiffs.

In the fourth codicil the testator says, "I *further* give and bequeath unto my dear wife Jemima, one *other* annuity." If he had intended to revoke any of the provisions made for her by his will and prior codicils, or to make a substitution, he would, instead of the words "*further*," and "*other*," have used the expression "in lieu and place of the provisions formerly made for her." The words at the end of the fourth codicil, by which the testator confirms his will and codicils in all respects, except as they are specifically altered, show that the general words of revocation in the beginning of that codicil cannot be taken in a limited sense.

The devise by the fifth codicil, of the Treravel estate to Francis Hearle for life, furnishes no argument against the construction in favour of the Defendant, since the estate is given to him immediately, and not subject to the life interest of Anna Maria Hearle, as it would have been under the will and prior codicils. The direction as to the effects brought by the Defendant upon her marriage with the testator, operates only to confirm her

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disposition thereof in the event of her decease in the lifetime of the testator, in which event she could not have taken them as legatee.

At the conclusion of the argument, the following question was put to the Judges.

Whether, according to the true construction of the will and codicils which have been stated upon this appeal, the devise in the will of the testator's copyhold messuage, or mansion-house, barns, stables, buildings, and pleasure grounds, lands, and hereditaments, called the Plomer Hill estate, was revoked by the fourth codicil.

The opinion of the Judges was delivered by the Chief Justice of the Common Pleas.

After stating the question, he proceeded as follows:—

Upon this question, though it must be admitted to be difficult to draw any very certain conclusion as to the intention of the testator, the opinion which we have formed, upon the best consideration of these instruments, is, that the devise in the will above specified was not revoked by the fourth codicil.

The general principle upon which this opinion proceeds may be stated thus:—The testator does by his will show a clear and manifest intention to devise the Plomer Hill estate to his wife for life, or during her widowhood.

If such devise in the will is clear, it is incumbent on those who contend it is not to take effect by reason of a revocation in the codicil, to show that the intention to revoke is equally clear and free from doubt, as the original intention to devise. For if there is only a reasonable doubt, whether the clause of revocation was intended to include

the particular devise, then such devise ought undoubtedly to stand.

It is the opinion of my learned brothers and myself, that the clause of revocation, contained in the fourth codicil, does not apply to the devise in question with such clearness and certainty, as to operate as a revocation of that plain and explicit devise contained in the will.

In this general conclusion we all agree; but it is scarcely to be expected, that in the discussion of a question of this nature we should all arrive at the same conclusion, upon grounds precisely the same. In stating, therefore, the grounds, upon which I have formed the opinion, not simply that there is no clear intention to revoke the devise, but that upon the clear construction of the codicil, the clause of revocation does not apply to this particular devise, I cannot undertake to say that I am expressing the opinion of all my learned brothers, in each particular reason which I may advance, although in most of those reasons all concur; and I am not aware that there is any material dissent or diversity of opinion in respect to any.

That the testator not only intended to devise to his wife the enjoyment of the house and premises in which he lived during her life or widowhood, but that it was a paramount object with him, appears abundantly by the first will and codicil. It forms the first subject of devise in his will. "In the first place, I give and devise all that my copyhold, message, or mansion-house, barns, stables, and buildings, pleasure grounds, lands, and hereditaments, called Plomer Hill House, in the parish of West Wycombe, and now in my own occupation,

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“ together with the cottages, or tenements, or premises thereto belonging, to trustees (therein named) and their heirs upon trust, for my present dear wife, Susanna Jemima Hicks, during her life or widowhood, or until she shall cease to reside at the same premises, or let the same, or permit the same to be occupied by any other person than herself, she paying all taxes and outgoings in respect thereof, and keeping the same in good and tenantable repair ; ” and then, in the event of her death, second marriage, ceasing to reside, or letting the premises, or permitting any other person to reside therein, he directs the trustees to be seised and possessed of these copyhold premises upon the same trust, as regard being had to the nature and quality of the tenure of the said copyhold premises will best correspond with the uses declared concerning the residue of his real estate.

He afterwards devises to his wife all the money in the funds, during her life or widowhood ; and after her death or marriage, to such person as should be either tenant for life or in tail, of his residuary estate, with a power to her to appoint 500*l.* as therein-mentioned ; and then gives to her absolutely all the ready money which shall happen to be in his mansion called Plomer Hill House at the time of his decease, all the articles of plate brought by her on her marriage, his family carriage, and the wines, provisions, and provender, live and dead stock, which at the time of his decease shall be on his copyhold “ premises,” and then devises “ all his household goods, furniture, books, prints, pictures, china, glass, and plate, not thereinbefore bequeathed, unto the trustees in trust for his said wife, during such time as by

“virtue of his will she shall be entitled to his copy-  
 “hold mansion and premises ; and after the de-  
 “termination of her estate in the same, in trust  
 “absolutely for the person who then, either as  
 “tenant for life, or in tail male, shall be in the  
 “actual possession of his residuary real estates.”

The testator, therefore, by his will has not only devised the mansion to his wife, but has shewn a clear and anxious desire that his wife should continue to reside in the mansion which he then occupied ; and that it should not be in any manner dismantled or unfurnished, but should be enjoyed by her in exactly the same state as that in which it was left at the time of his death. In the first codicil, made after the interval of a year, it is evident that the same intention, that his wife should reside in the mansion house in the same state as left at the time of his death, continued to be predominant in the testator's mind ; for after reciting the bequest in the will to his wife of the plate, furniture, and other articles before adverted to, he proceeds to revoke that bequest, in plain and direct terms, and in lieu thereof bequeaths all his farming stock, household goods, &c., and all other his effects which should be in or about his residence at Plomer Hill aforesaid, and usually considered as comprised in and constituting his establishment there, unto his wife for her own use and benefit absolutely.

It is further to be observed, that the testator's wife appears to have been, from the time of the making of the will down to the time of making the fifth and last codicil, the object of his peculiar bounty and regard, there being no codicil, with the exception, perhaps, of the third, which does

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not materially add to the provision already made for her by his previous dispositions in her favour.

The will gives his wife a rent charge of 300*l.* a year for life upon the residue, with a contingent increase of 100*l.* per annum, in case of the failure of the issue of his son. By the first codicil, made after the death of his son without issue, he gives his wife absolutely the additional annuity of 100*l.* per annum, and bequeaths to her the residue of his personal estate absolutely to her own use ; by his second codicil, he constitutes her sole executrix and residuary legatee ; by the third codicil, he gives her the proceeds and profits of the five shares which he held in the County Fire Office for her life ; by the fourth, the codicil in question, he gives to his wife a further annuity of 100*l.* per annum for her life ; and by the fifth, he gives to her and at her disposal all sums of money which she or the testator might be entitled unto out of the effects of her late father, or that any other friend might leave her ; and he orders his executors, in case she shall die before him, to fulfil her will and disposal thereof. This codicil was executed about nine months subsequently to that upon which the question arises.

The will thus containing such a clear devise to the wife, with such a manifest indication of intention that she should reside in the mansion-house called Plomer's Hill ; and each codicil containing proof that the regard of the testator for his wife continued unabated and unimpaired, until long after the execution of the fourth codicil ; the first observation that arises is, that it is extremely improbable in itself that the testator should by general words, without making any reference to

his wife, or any disposition in lieu thereof in her favour, revoke the only devise of land which he had made to her, which forms the first subject of his will, to which repeated allusions are made in the will itself and first codicil; and her residence in which, during her widowhood, appears to have been the favourite object of his mind.

Still, however, the question arises, whether he has, by the fourth codicil, revoked this devise or not.

That the words used in the codicil do not necessarily revoke this devise, is sufficiently manifest by referring to them. The testator begins by saying, I do make and add this further codicil to my will, hereby revoking and making null and void several of the dispositions heretofore made by me in my said will and codicil, of all my freehold, copyhold, and personal estate and effects, of all and every kind and description, and concludes it by saying, "hereby in all other respects, but "what is above mentioned, confirming my said "will and codicils."

There are no words, therefore, expressly revoking this devise; on the contrary, if we hold all the dispositions of his real estate to be revoked, we construe the codicil directly against the testator's declared intention. It is as much open to argument that the devise to the wife may be one of these, or the very one which the testator intended to confirm, as that it was one of the several which he intended to revoke. Whether, therefore, this devise was revoked, must be determined not by any express words to that effect, but by the consideration whether upon the construction of the codicil, the devise and disposition therein con-

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tained must of necessity be held inconsistent with the devise to the wife, or whether such a construction may be put upon the devise in the codicil, that both the will and the codicil may stand together.

To consider this question, it is necessary, in the first place, to observe how the disposition of the testator's property stood under the will and the first codicil, at the time when the fourth codicil was made; and, upon a careful inspection of the will and first codicil, it will be found that at the time of executing the fourth codicil, the testator's real property stood thus disposed of; viz. the copyhold estate (the Plomer Hill House) was devised to the wife for life, the remainder forming part of the residue.

The Treravel estate stood thus an equitable estate to his daughter, Anna Maria Hearle, for life for her separate use, remainder to her husband for life, remainder to her children in tail, as tenants in common; the remainder forming part of the residue.

The residue of his property, consisting of the manor and advowson of Bradenshaw, two freehold farms in the county of Bucks, and so much of the testator's estate in the Plomer Hill House and the Treravel property as were undisposed of, and also comprising all his personal property, except the partial interests given to the wife, which have been before enumerated, formed one mass, which, at the time of making the fourth codicil, in consequence of the death of his only son without issue, stood devised immediately to the testator's grandson, John Graves, for life; remainder to the first and other sons of the testator's daughter, Anna

Maria Hearle, in tail male; remainder to his own right heirs.

Whilst his property stood thus disposed of, the fourth codicil is made, in which, after declaring his intention to revoke several of the dispositions made by him in his said will and codicils, of all his freehold, copyhold, and personal estate and effects of all and every kind and description, "instead of  
 "and in the place of such devise, disposition, and  
 "bequest thereof, he gives, devises, and bequeaths  
 "all and every his freehold, copyhold, and personal estate and effects of every kind and description whatsoever and wheresoever situated,  
 "unto his daughter Anna Maria Hearle, and from  
 "and after the determination of that estate, unto  
 "his grandson John Graves, and his heirs in strict  
 "entail, as in the said will mentioned," with the additional clause in the codicil as to the time when John Graves shall take; "and in failure of such  
 "issue of the said John Graves, he orders that his  
 "said estates and effects shall go and descend as  
 "is by his said will directed," and then ratifies and confirms the several annuities and donations by him in his said will and former codicils given and bequeathed, and gives a further annuity of 100*l.* to his wife, under the same restrictions as the former. Now if this devise in the codicil can be construed to be confined to the property which formed the testator's residue only, then the devise in the will of the copyhold estate in question, to the wife for her life, will remain unrevoked, and the object of the testator in his codicil may still be carried into effect.

And that such may be the construction without violating the words of the codicil, appears to be

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by no means unreasonable. In the first place, the codicil professes to make void "several of the" "dispositions heretofore made by him in his will" "and codicils of all his freehold, copyhold, and" "personal estate and effects of all and every kind" "and description." Now the only disposition made of all his freehold, copyhold, and personal estate and effects is, that devise which relates to the residue in which all his property, freehold, copyhold, and personal, is brought together in one mass, with the exception of that part of the personal estate which is given to the wife absolutely by the will, and which is expressly confirmed to the wife by the subsequent part of this very same codicil.

In the second place, the testator says, instead of such devise, disposition, and bequest, using the singular number, which would in strict grammatical construction be applicable to the devise or disposition of the residue, but not to the various dispositions contained in the will.

In the third place, the death of his only surviving son William, who was the first taker for life under the clause disposing of the residue, makes it not improbable that he should wish to substitute in the residuary clause his only surviving daughter, to take the same estate therein which was before given to the son.

In the fourth place, if the devise to the wife of the copyhold estate is to be held to be revoked, then not several only of the dispositions of the real property contained in the will, but all such dispositions, are revoked or altered; for the wife's life estate in the Plomer Hill property is gone, the equitable estate for life given by the will to the

daughter, in the Treravel estate for her separate use, is merged in a legal estate for life, given to her generally; and the daughter has a life estate in the residue now for the time interposed before that of John Graves. But to revoke all the dispositions of the realty in the will and codicil is against the express directions of the testator.

Still further, if the devise of the Plomer Hill estate, to the wife, is revoked, inasmuch as the codicil confirms the donations made in the will and codicil, the wife would still be entitled absolutely to the furniture, and to every thing which constitutes the establishment of the house; so that the house, upon the death of the testator, would immediately go to the daughter, but stripped and dismantled of all its furniture and establishment, which the testator appeared anxiously to intend should be kept together. Again, the codicil gives an estate for life to A. M. Hearle, and from and after the determination of that estate to his grandson John Graves, and his heirs in strict entail, "as in his said will directed." Now this express reference to the will draws the attention to that part of the will in which alone there is any mention of John Graves, that is, to the disposition of the residue. It seems, therefore, a very reasonable construction of the codicil that, as the ultimate remainder of the property intended to be thereby disposed of is limited by express reference to the clause in the will, which contains the devise to John Graves in strict entail, to infer that the property itself devised by the codicil is the same property as that contained in the devise of the will to which such reference is made, viz. the residue only. By this construction the only alter-

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ation effected by the codicil is, the substitution of a devise to the daughter for life, instead of that given to the son, to take place immediately next before the estate given to John Graves. But, if the devise operates on the residue only as before observed, it leaves the particular estate already devised to the widow untouched.

There are, undoubtedly, some difficulties attending the construction of the will and codicil, whichever way they are construed. It may be said against the construction above made, that the words of devise in the codicil to the daughter are immediate, and that the testator, by his first codicil, shows that he knew how to interpose a new estate by proper terms between those already created by the will. It certainly is so; but it is obvious in comparing the frame of the first and the fourth codicil, and looking to the description of the witnesses to each respectively, that the former was made, with the latter, without legal assistance, so that no great reliance can be placed on that argument.

It may be argued, again, that the testator, by the codicil, directs that in case his grandson shall not be twenty-one at the time the estates shall devolve on him by the death of the testator's daughter, the rents shall accumulate for his benefit, and that if the wife took a life estate in the copyhold, non constat but that she might survive the daughter, in which case the Plomer Hill estate would not devolve to the grandson on the daughter's death; but it is not at all surprising that a testator, in preparing such an instrument, should have overlooked or not cautiously have provided for the possibility of his wife outliving his daughter, the more es-

pecially where the devise to the wife related only to a part of the estate.

It may further be contended, that by the fifth codicil the testator has proved that he was aware that the fourth codicil had revoked the estate for life, which he had previously given by the first codicil to his son-in-law ; for he would not otherwise have devised to him the rents and profits of the Treravel estate during his life. It must be granted that the fourth codicil has necessarily that effect ; but this arises not from his devise of the life estate to his daughter, for the only effect of that devise was to convert her equitable estate for her own separate use into a legal estate for life, but it arises from the devise to the grandson being made "from and after the determination of that "estate," words that necessarily excluded the devise to the son-in-law, which he had before made by his first codicil. This argument, therefore, does not seem to bear upon the question whether the life estate to the widow is revoked or not.

Upon the whole, although these and perhaps other difficulties may be urged against the construction above proposed, we think the *onus probandi* of showing that the devise to the wife is included in such clause ; on the contrary, that upon the proper construction of this codicil, the intention appears to have been that the devise to the wife should not be revoked by the codicil.

Upon these grounds we think that the devise in question has not been revoked.

After this opinion had been delivered, the Lord Chancellor, expressing his concurrence, moved that the judgment of the Exchequer Chamber should be affirmed, and it was affirmed accordingly.

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## ENGLAND.

(COURT OF EXCHEQUER.)

WILLIAM SPELLS GARDINER - *Appellant ;*  
STEPHEN SIMMONS - - - *Respondent.*

N. having filed in the Court of Exchequer a bill for an account of tithes, which was dismissed with costs for want of prosecution, was committed to the Fleet Prison for contempt, upon disobedience of an order for payment of the costs; and thereupon sequestration issued. By an order made on the application of the Respondent S., (the Defendant in the suit), stating that the Court had been informed that there was no property of N. which the commissioners could sequester, except certain tithes of which N. was seised, and had demised to G., the Appellant, at a yearly rent, and that the commissioners had demanded the payment of the costs, &c. from the Appellant out of the rent in his hands due to N.: it was ordered that the Appellant should show cause why he should not attorn tenant to the commissioners, and pay to them, out of the rent due, the amount of the costs in the suit, and of the sequestration, &c. Upon this order, the Appellant appeared, and for cause, among other things, showed that the tithes did not belong to N., but to one W. Whereupon it was, by a further order of the Court, referred to the Master, to enquire whether, at the time of the service of the order of sequestration upon the Appellant, the tithes in question belonged to N.; and that W. should be at liberty to come in before the Master and be examined *pro interesse suo*.

Upon appeal against these two orders no counsel appearing for the Appellant, the House refused to affirm the judgment, unless the case were stated by the counsel for the Respondent, and considered by the House; which not being done, it was directed that the agent for the Respondent

should give in his account of costs ; and thereupon an order was made, reciting that no counsel having appeared for the Appellant, the appeal was dismissed with 100*l.* costs.

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**I**N Trinity term, 1823, John Henry Nainby filed his bill of complaint in the Court of Exchequer, at Westminster, against Charles Jollands, Henry Podmore, William Allin, and William Potter ; and also against Stephen Simmons, the above-named Respondent, which bill was afterwards amended by an order of the court ; and by such bill the Plaintiff prayed, amongst other things, that the Defendants thereto might be decreed to come to an account with the Plaintiff for the single value of the tithes of the titheable matters and things had and taken by them respectively, upon and from off their respective farms and lands, within the parish of Lindfield, in the county of Sussex, since the times in the bill mentioned ; and that they might be decreed to pay to the Plaintiff what should appear to be due from them respectively upon taking such accounts.

The Respondent appeared, and put in his answer to the bill ; and by an order of the Court of Exchequer, made in the cause, bearing date the 3d of July, 1827, it was ordered, that the bill so filed by the Plaintiff Nainby should be dismissed out of the court, as against the Respondent, for want of prosecution, with costs, to be taxed for the Defendant by one of the Masters of the court, unless cause should be shown to the contrary at the sittings after the then Trinity term ; and no cause having been shown against such order, the Master taxed the Respondent's costs at the sum of 32*l.* 17*s.*

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The costs were not paid, and the Plaintiff Nainby having been, by the Court of Exchequer, committed to his Majesty's prison of the Fleet for his contempt in not paying such costs, an order was made in the cause, bearing date the 7th of May, 1828, that a writ of sequestration should issue under the seal of the court, to sequester the Plaintiff Nainby's personal estate, and the rents, issues, and profits of his real estate, until the Plaintiff should have fully paid the sum of 32*l.* 17*s.*, cleared his contempts, and the court should make further order therein.

A writ of sequestration was issued in the cause, under the seal of the court, directed to Pilfold Medwin, Henry Padwick, Thomas Coppard, Samuel Waller, and John Allin.

By a further order of the court, and in the cause, bearing date the 20th of November, 1829, made on the motion of counsel for the Respondent, after therein stating, that the Court of Exchequer had been informed, on the part of the Respondent, that the Plaintiff Nainby had not any lands, tenements, hereditaments, or personal estate whatsoever, which could be entered upon or possessed by the commissioners named in the writ of sequestration, and whereupon the commissioners could sequester and take the rents and profits, and also the personal estate of the Plaintiff Nainby into their hands, until he should have fully paid the sum of 32*l.* 17*s.* in the writ mentioned, and cleared his contempts, except that the Plaintiff Nainby was seised and possessed of, or entitled to all and singular the tithes of corn, grain, and hay, and other great and small tithes and agistment tithes, arising and accruing within the parish of Lindfield aforesaid,

which tithes the Plaintiff Nainby had demised or let to the Appellant at a certain yearly rent. And further, that Pilfold Medwin, one of the commissioners in the writ of sequestration named, had, on the 29th day of September then last, in the presence of John Allin, another of the commissioners in the writ of sequestration named, served the Appellant with a true copy of the writ of sequestration; and at the same time also served the Appellant with a notice and demand, requiring the Appellant, by virtue of such sequestration, to render and pay to Pilfold Medwin and John Allin, all and singular the tithes of corn, grain, and hay, and all and singular the great and small and agistment tithes, the property of the Plaintiff; and also requiring the Appellant to pay Pilfold Medwin and John Allin all and every the rent or rents, or other sum or sums of money, or other property, that was or were, should or might be due from him to the Plaintiff: and further stating, that the Appellant, on being served with a copy of the writ of sequestration and notice of demand, admitted that he was the renter of the tithes, that he was about to pay his rent, due on that day, to the Plaintiff Nainby, and that thereupon Pilfold Medwin, in the presence of John Allin, had demanded of the Appellant the payment of the sum of 32*l.* 17*s.* in the writ mentioned, out of the rents so stated to have been acknowledged to be due and in his hands, together with the costs of the sequestration, which the Appellant had not then paid to Pilfold Medwin and John Allin as such commissioners, or any part thereof. And further stating, that the rent payable to the Appellant was more than sufficient to cover the said 32*l.* 17*s.* and costs, so

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demand by Pilfold Medwin, and that it had been thereupon prayed by counsel for the Respondent, that the Appellant might show cause to the court why he should not pay to the sequestrators in the writ of sequestration named, or to one of them, the sum of 32*l.* 17*s.* in the writ mentioned, and the costs of the sequestration, and also the costs of the application: it was ordered that the Appellant should show cause to the Court at a time then named, why he should not attorn tenant to the commissioners in the writ of sequestration named; and why he should not pay to the commissioners, or one of them, the sum of 32*l.* 17*s.* in the writ mentioned, and the costs of the sequestration, and of the application, as prayed.

An affidavit was made in support of the order, and of the motion to confirm the same.

Contradictory affidavits were filed in opposition and in reply.

The case made by the affidavits on the part of the Appellant was, that the Appellant was tenant to one Maria Williamson of all the tithes of the parish of Lindfield, and had never been tenant thereof, or of any part thereof, to John Henry Nainby. At the time of the filing of the amended bill, John Henry Nainby had alleged himself to be entitled to all the tithes of the parish, and on the part of the Appellant it was not shown how Maria Williamson became entitled to the tithes. The agreement under which the Appellant alleged that he held the tithes, together with a messuage or tenement, buildings, land and garden used as a homestead, for collecting the same, bore date (as stated in one of the affidavits) on the 2d of April, 1829, after the issuing of the sequestration; and

it was impeached by the affidavits on the part of the Respondent, as under the circumstances, and upon the face of it, showing strong evidence of fraud and collusion. Affidavits on the part of the Respondent, also, showed that Maria Williamson was the sister of John Henry Nainby, and brought forward many circumstances tending to prove that the said agreement was not a fair and *bonâ fide* agreement, and that John Henry Nainby was still entitled to the tithes; in particular it appeared by such affidavits that the Appellant, upon being served with the writ of sequestration, had alleged that he was tenant of the tithes to John Henry Nainby, and was about to pay him some rent due for the same. The latter fact, however, was controverted by the affidavits on the part of the Appellant.

The Appellant, by his counsel, appeared on the 16th day of December, 1829, and shewed cause against the order of the 20th day of November, 1829; and, after hearing counsel for the Respondent, the Court of Exchequer made an order, bearing date the 16th day of December, 1829, whereby it referred to one of the Masters of the Court, to enquire and report to the Court whether, at the time of the service of the writ of sequestration in the order of the 20th of November upon William Spells Gardiner, in the order mentioned, the tithes of the parish of Lindfield, or any and which of them, belonged to the Plaintiff John Henry Nainby. And it was thereby further ordered, that Maria Williamson should be, and she was thereby, at liberty to come in before the Master, and to be examined, *pro interesse suo*, upon interrogatories, to be for that purpose left with the Master by the

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Respondent; in the making of which enquiry it was further ordered that all parties should produce before and leave with the Master, upon oath, if required, all deeds, books, papers, and writings in their or any of their custody or power, relating to the said enquiry, and be examined upon interrogatories touching the same, as the Master should direct. And the Master was thereby armed with a commission, as well for the examination of the parties, as of witnesses in aid of the enquiry; and one or more commission or commissions were to issue, &c., if necessary; and if any special matter should arise in making the enquiry, the Master was to state the same to the Court. And it was further ordered, that the Master should make his report to the Court touching the matters thereby referred, with all convenient speed, when the Court would make further order therein as should be just.

The appeal was against the orders of the 20th of November, 1829, and the 16th of December, 1829.

For the Appellant the following reasons were assigned in support of the appeal.

First, because even supposing the fact to have been that the Appellant was lessee or renter of the tithes in question to or under the Plaintiff Nainby, at the time of the service of the notice on him of the sequestration, yet that any money payment reserved to be made by the Appellant to the Plaintiff Nainby, in consideration of such demise to, or enjoyment of, the said tithes by the Appellant, was not, in point of law or fact, a rent, inasmuch as a distress would not lie for it, and therefore it could only be treated as a sum of money due upon the

special contract of the Appellant; and being such, it is merely a *chose* in action: and there is no power residing in courts of equity to render a *chose* in action available to a sequestration, and the Court of Exchequer should therefore either not have granted, or, having granted, should at once have discharged the order to show cause, and not have directed a reference, which could only be a useless and unnecessary proceeding, if in point of law a *chose* in action is, as it is submitted to be, unavailable to a sequestration, through the medium of a mere motion or other interlocutory application.

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Secondly, because it appears by the Respondent's own showing, that he seeks to render available to the sequestration a sum of money which he alleges to have been due at the time of the service of the notice of such sequestration; and even in the case of a sum of money due as and for rent of lands, tenements, and other corporeal hereditaments, such accrued rent would be a mere *chose* in action, or personal demand, by reason that it would not run with the land to an heir, or a subsequent purchaser; and, therefore, an attornment would not assist the Respondent in recovering it, inasmuch as an attornment cannot carry over or transfer a right to recover rent accrued due before such attornment.

Thirdly, because the question of fact raised by the affidavits, and in showing cause against the order of the 20th day of November, 1829, being, whether the Appellant was or was not lessee or renter of the tithes under the Plaintiff Nainby, and not to whom the tithes in question belonged, the reference to the Master directed by the order of

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the 16th of December, 1829, (supposing the Court of Exchequer to have had sufficient authority or jurisdiction to make any order on the application other than for its dismissal,) should have been, to enquire whether the Appellant was or was not lessee or renter of the tithes under any and what demise from Nainby; for although Nainby might be, and although the Master, by his report, might certify that he was, the rightful owner of the tithes, yet it would not necessarily follow from such premises that the Appellant was his lessee; for some other person might have had the adverse enjoyment of such tithes, and having such adverse enjoyment, might have demised them to the Appellant.

For the Respondent the following reasons were assigned.

First, because the order of the 20th of November, 1829, is, in all respects, conformable to the established practice of Courts of Equity, in cases where third persons are in possession of property belonging to parties whose property becomes subject to the jurisdiction of such courts, or amenable to process issued thereout.

Secondly, because the tithes, if belonging to John Henry Nainby, and any rent payable in respect thereof, if the same have in fact been demised to the Appellant, are available to the sequestration, or may be made available thereto by proper proceedings, to be directed by the Court of Exchequer for that purpose.

Thirdly, because the circumstances disclosed by the affidavits render it in the highest degree probable that no *bonâ fide* alienation of the tithes, and no *bonâ fide* lease or demise thereof, has been made;

but that if any alienation, lease, or demise of the tithes has in fact been made, the same is collusive and fraudulent, and made with intent to defeat the sequestration.

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The appeal came on for hearing at the bar of the House of Lords, on the 21st of June, 1832, when counsel appeared for the Respondent, and asked for an affirmance of the judgment. But no counsel appearing for the Appellant, it was observed by the Lord Chancellor that the appeal might be dismissed for default of appearance; but that the judgment could not be affirmed unless the case was stated, and the House, upon consideration, deemed it to be right: and he advised that the judgment should be postponed until an account of costs incurred should be furnished by the agent for the Respondent; and that in the order dismissing the appeal, it should be stated that it was for want of appearance. The account having been given in on a subsequent day, an order was made to the following effect.

No counsel appearing for Appellant, the agent for the Respondent was ordered to deliver in his bill of costs; which being done, it was ordered and adjudged that the petition and appeal should be dismissed, and that the Appellant should pay to the Respondent 100*l.* costs.

Appeal dismissed.

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## ENGLAND.

(COURT OF KING'S BENCH.)

IN ERROR.

WILLIAM MELLISH - - - *Plaintiff.*GEORGE RICHARDSON - - - *Defendant.*

Upon the trial of an action of *assumpsit* in the C. P. in Hilary term, 1824, a general verdict was found for the Plaintiff upon all the counts of the declaration. In Easter term following, a rule was obtained by the Defendant calling upon the Plaintiff to show cause why the verdict should not be set aside and a new trial granted; or, why judgment should not be arrested. This rule was discharged in Trinity term 1824, and final judgment signed for the Plaintiff. Upon this judgment a writ of error was brought in the K. B., returnable in Michaelmas term 1824: the record and process were brought into that Court, and in Hilary term 1825, errors were assigned. At the sittings before Michaelmas term 1825, the case was argued; and on the 25th of November 1825, the judgment of the C. P. was reversed by the K. B., and a *venire de novo* awarded, upon the ground that there did not appear on the face of the record to be any good or sufficient consideration for the agreement mentioned in the third and fourth counts of the declaration. In the meantime, on the 10th of November 1825, a rule had been obtained by motion on behalf of the Plaintiff in the C. P. to amend the *postea* by the notes of the judge who tried the cause, by entering a verdict for the Plaintiff on the first count of the declaration, and for the Defendants on the other counts. This rule was made absolute on the 24th of November 1825. On the next day a rule was obtained to amend the judgment roll in the cause, and make it conformable to the *postea*; and this rule was made absolute on the 26th of November 1825. On which same day a rule was obtained by motion in the K. B. to stay the judgment, and amend the roll by the amended judgment of the C. P.; and afterwards the roll was amended accordingly, and the judgment of the C. P. thereupon affirmed by the K. B.

Upon this affirmance a writ of error was prosecuted in D. P.;

and the transcript of the record, brought into the House, contained, by consent of the Judges of the K. B., entries of the orders upon which the amendments had been made as well as the pleadings and final judgment: Held, that it is contrary to the practice and not within the jurisdiction of the House of Lords or of any court of error to entertain writs of error upon interlocutory proceedings; and that the consent of the Judges of the inferior court cannot give such jurisdiction.

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**T**HIS was a writ of error, brought by William Mellish, (the Defendant below,) on the affirmance, by the Court of King's Bench, of a judgment in the Court of Common Pleas at Westminster, in an action of assumpsit, brought by George Richardson the Defendant in error, against William Mellish the Plaintiff in error, for the breach of an agreement.

The declaration consisted of four special and three common counts.


The first special count was as follows:—Whereas heretofore, to wit, on the 11th day of January, 1819, at London, by a certain agreement then and there made, it was then and there mutually agreed, between the said Defendant on the one part, and the said Plaintiff on the other part; that is to say, that provided the said Defendant should purchase the East India ship *Minerva* from Messrs. Smith, Timbrell, and Smith, of which ship the said Plaintiff was then the commander, and provided the consent of the Honourable Court of Directors of the East India Company could be obtained to the exchange, that he, the said Plaintiff, would allow Captain John Mills to go as commander of the said ship *Minerva*, upon this further condition,

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that he, the said Defendant, would give the said Plaintiff the command of the ship *Marquis of Ely*, belonging to the said Defendant, and then taken up by the said East India Company : And it was also thereby further agreed between the said parties as aforesaid, that provided the said John Mills should die, or provided he should at any time thereafter not choose to proceed as commander of the said ship *Minerva*, either upon that or upon any future voyage, that then and in that case, whensoever it might occur, the command of the said ship *Minerva* should be given to the said Plaintiff, but only for his own personal use, and not otherwise ; and provided also that he was in England, ready and willing to receive it in due time, to enable the said ship to proceed : *And it was also further agreed between the said parties, that provided the Honourable Court of Directors should not assent to the proposed exchange, that then and in that case the said Plaintiff should proceed for that voyage as commander of the Minerva, and immediately upon her return to England should give up the command of the said ship Minerva to the said John Mills, upon the same condition and with the same reservations as were thereby agreed to, in the event of the exchange being then completed for the then present voyage :* And further, it was thereby declared, and fully understood and agreed between the said parties, that that agreement was only intended to relate to the four voyages next ensuing, for which the said ship *Minerva* was then engaged by the Honourable Directors ; that until their expiration, it was to be in full force, and to have effect, as to the reinstating the said Plaintiff in the command of the *Minerva*, under whatever circumstances might

prevent Captain Mills from proceeding; and that when the said ship Minerva should have completed her then next four voyages, that agreement was, to all intents and purposes, to be null and void: And the said agreement being so made as aforesaid, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, in consideration thereof, and that the said Plaintiff, at the special instance and request of the said Defendant, had then and there undertaken and faithfully promised the said Defendant to perform and fulfil the said agreement in all things on his part and behalf to be performed and fulfilled, he the said Defendant undertook, and then and there faithfully promised the said Plaintiff, to perform and fulfil the said agreement in all things on his part and behalf to be performed and fulfilled: And the said Plaintiff in fact saith, that afterwards, to wit, on the day and year aforesaid, to wit, at London aforesaid, the said Defendant did purchase the said ship Minerva from the said Messrs. Smith, Timbrell, and Smith, and that afterwards, to wit, on the day and year aforesaid, at London aforesaid, the consent of the said Court of Directors of the East India Company was obtained to the said exchange: And the said Plaintiff did then and there allow the said John Mills to go, and the said John Mills did go, as commander of the said ship Minerva; and that the said Defendant did then and there give the said Plaintiff the command of the said ship Marquis of Ely: And the said Plaintiff further says, that afterwards, and before the expiration of the said four voyages for which the said ship Minerva was engaged as aforesaid, and when two of the said voyages remained to be performed, to wit, on the

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1st day of August, in the year of our Lord 1821, to wit, at London aforesaid, the said John Mills died, whereof the said Defendant then and there had notice: And although the said Plaintiff was then and there in England, and able, and ready, and willing, and offered to receive and take the command of the said ship *Minerva*, in due time to enable the said ship to proceed, and the said Plaintiff then and there desired and wished to take the command thereof to his own personal use, and not otherwise; and then and there requested the said Defendant that the command of the said ship might be given to him, the said Plaintiff, as aforesaid; and although the said Plaintiff had always, from the time of making the said agreement, hitherto well and truly performed, fulfilled, and kept all things in the said agreement contained on his part and behalf to be performed, fulfilled, and kept, to wit, at London aforesaid: yet the said Plaintiff in fact saith, that the said Defendant contriving, and wrongfully and unjustly intending, to injure the said Plaintiff, did not, nor would, when he was so requested as aforesaid, or at any time thereafter, give the said command of the said ship *Minerva*, nor was the same at any time given to the said Plaintiff: And the said Defendant hath wholly refused and still doth refuse to give the said command, or to suffer or permit the same to be given to the said Plaintiff, and the said command hath been given to another person for the said two remaining voyages, to wit, at London aforesaid, by means whereof he, the said Plaintiff, hath been deprived of certain pay, and divers great gains and profits, amounting to a large sum of money, to wit, the sum of 15,000*l.* of lawful money

of Great Britain, which would otherwise have arisen and accrued to him from the said command of the said ship or vessel, to wit, at London aforesaid.

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The second special count was similar to the first, except that instead of stating the death of John Mills, it was stated therein, that before the expiration of the four voyages for which the ship *Minerva* was engaged, and when two of the last mentioned voyages remained to be performed, and while the said ship *Minerva* was in England, and was about to proceed on a certain voyage to the East Indies, to wit, on the first day of September, 1821, the said John Mills was prevented from proceeding in the said ship *Minerva*, as commander thereof on the said last-mentioned voyage.

The third special count of the declaration was the same as the first, omitting the clause of the agreement providing for the case of the dissent of the East India Company.

The fourth special count was similar to the third, except that it omitted the last clause in the agreement, whereby it was declared, and fully understood and agreed between the parties, that that agreement was only intended to relate to the four voyages next ensuing, for which the said ship *Minerva* was then engaged by the Directors: that until their expiration, it was to be in full force, and to have effect as to the reinstating the said Plaintiff in the command of the *Minerva*, under whatever circumstances might prevent Captain Mills from proceeding; and that, when the said ship *Minerva* should have completed her then next four voyages, that agreement was, to all intents and purposes, to be null and void.

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The fifth, sixth, and last counts of the declaration were the common counts for money paid, laid out, and expended by the Plaintiff to and for the use of the Defendant, and for money had and received by the Defendant to and for the use of the Plaintiff, and on an account stated between the parties.

To this declaration, the Plaintiff in error pleaded the plea of *non assumpsit*, on which issue was joined, and the cause came on for trial at the sittings after Hilary term, 1824, when a general verdict was found for the Defendant in error, on all the counts of the declaration, for 7500*l.* damages, besides costs of suit.

In Easter term following, the Plaintiff in error obtained a rule in the Common Pleas, calling upon the Defendant in error to show cause why the verdict should not be set aside and a new trial granted, or why the judgment should not be arrested; which rule was discharged in Trinity term following; and on the 17th of July, 1824, final judgment was signed for the Plaintiff by the Court of Common Pleas.

On this judgment a writ of error was brought in the Court of King's Bench, tested on the 2d of July, 1824, and returnable on the morrow of All Souls in Michaelmas term following; under which the record and process of the plaint therein-mentioned, with all things touching the same, were returned by the Lord Chief Justice of the Court of Common Pleas, into the Court of King's Bench; and in Hilary term, 1825, the following errors were assigned by the Plaintiff in error, viz. "That  
" in the record and proceedings aforesaid, and  
" also in giving the judgment aforesaid, there is

“ manifest error in this, to wit, that the declaration  
 “ aforesaid, and the matters therein contained, are  
 “ not sufficient, in law, for the said George Ri-  
 “ chardson to have or maintain his aforesaid action  
 “ thereof against the said William Mellish. There  
 “ is, also, error in this, to wit, that, by the record,  
 “ it appears that the judgment aforesaid, in form  
 “ aforesaid given, was given for the said George  
 “ Richardson against the said William Mellish :  
 “ whereas, by the law of the land, the said judg-  
 “ ment ought to have been given for the said  
 “ William Mellish against the said George Ri-  
 “ chardson. There is, also, error in this, to wit,  
 “ that the declaration aforesaid does not disclose  
 “ or set forth any good or sufficient consideration,  
 “ in law, for the said George Richardson to have  
 “ or maintain his aforesaid action thereof against  
 “ the said William Mellish. There is, also, error  
 “ in this, to wit, that, by the declaration aforesaid,  
 “ it appears that the several agreements, and pro-  
 “ mises, and undertakings therein mentioned and  
 “ set forth were and are, and each and every of  
 “ them was and is founded on a bad and insuffi-  
 “ cient consideration, and were and are contrary  
 “ to public policy, and illegal and void. There is,  
 “ also, error in this, to wit, that it is not averred in  
 “ or by the said declaration, nor does it thereby  
 “ appear, that the East India Company were privy  
 “ or assented to the said agreements in the said  
 “ declaration mentioned, or any or either of them,  
 “ or to the appointment of the said George Ri-  
 “ chardson as commander of the said ship Minerva  
 “ for the said four voyages in the said agreement  
 “ mentioned, or for the two last of such voyages,  
 “ or either of them, or that he the said George

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“Richardson had been or ever was appointed to  
 “or approved of by the said Company for such  
 “command of the said ship or vessel ; or that he  
 “was duly qualified or entitled to go as such com-  
 “mander thereof on or for the said two last-men-  
 “tioned voyages, or either of them.”

The Plaintiff having joined in error, and the errors having been argued before the Judges of the Court of King's Bench, at the sittings before Michaelmas term, 1825, the Court, on Friday, the 25th of November, reversed the judgment of the Court of Common Pleas, and awarded a *venire de novo* to issue, on the ground that there did not appear, on the face of the record, to be any good or sufficient consideration for the agreement mentioned in the third and fourth counts of the declaration; which reversal was, at the opening of the office on the following day, entered of record in the Court of King's Bench, and a writ of *venire facias de novo* awarded by the Court, returnable in eight days of St. Hilary, in Hilary term, 1826.

On Thursday, the 10th of November, 1825, a motion was made on behalf of the Defendant in error, in the Court of Common Pleas, and a rule obtained that the Plaintiff in error or his attorney should show cause why the *postea* in the cause should not be amended by the notes of Robert Lord Gifford, by entering a verdict for the Defendant in error on the first count of the declaration, and for the Plaintiff in error on the other counts, which rule or order was made absolute by the Court of Common Pleas on Thursday, the 24th of November, 1825, and on the next day another rule or order was made by the Court of Common Pleas for the

Plaintiff in error or his attorney to show cause peremptorily on the morrow why the judgment-roll in the cause should not be amended and made conformable to the amended *postea*; which last-mentioned rule or order was made absolute by the Court of Common Pleas on Saturday, the 26th of November, 1825.

A motion was then made on behalf of the Defendant in error in the Court of King's Bench, and a rule or order obtained on Saturday, the 26th of November, 1825, for the Plaintiff in error or his attorney to show cause why the judgment should not be stayed, and why, upon payment of costs, to be taxed by the Master, the judgment returned in the cause to the Court on the writ of error should not be amended by the amended judgment of the Court of Common Pleas; which last-mentioned rule or order was, on Monday next after fifteen days of St. Martin, (being the last day of Michaelmas term, 1825,) enlarged by the Court, until the 4th day of the then next Hilary term.

On Saturday, the 29th of April, 1826, another rule or order was made by the Court of Common Pleas, upon application of counsel in behalf of the Defendant in error, whereby it was ordered that the proper officers of that Court should attend the Court of King's Bench at Westminster, on Monday, the 1st day of May then next, with the *postea* and judgment-roll in the cause, on the hearing of a motion to amend the transcript and judgment-roll.

At the sittings after Hilary term following, by a special rule or order of the last-mentioned Court entitled on Monday next after the octave of the Purification of the Blessed Virgin Mary, in the eighth year, &c. after directing in what manner such entry

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should be made, it was ordered that the record then there remaining should be amended, according to the prayer of the said George Richardson; that is to say, according to the said rules or orders of the Court of Common Pleas for amending the same, and that the judgment aforesaid of the said Court of Common Pleas, according to the amendments aforesaid, should be affirmed; and in pursuance of which last-mentioned rule or order the judgment of the Court of Common Pleas, according to the amendments aforesaid, was affirmed by the Court of King's Bench.

On this affirmance, a writ of error was brought by the Plaintiff in error.

For the Plaintiff in error, *Mr. Barnewall*.\*

At common law, amendments could not be made after judgment entered on the record.† After judgment, amendments can only be made by virtue of the statute of amendments‡: they are confined to misprisions of the clerk. In this case, the clerk entered the verdict, not by misprision, but as he was directed by the party whose misprision it is; and such error cannot be amended.§ The authorities cited in support of the judgment below relate to amendments before judgment, or misprision of the clerk after judgment.

The verdict for the Plaintiff was general; and he might have directed that it should be taken for him on the first count only, or by motion in court

\* Mr. Barnewall being absent when the writ of error was called on, the counsel for the Defendant in error was heard; and the case was then, by indulgence of the House, adjourned.

† *Marriot v. Lister*, 2 Wils. 147.

‡ 8 H. 6. c. 12.

§ *Green v. Rennet*, 1 T. R. 782. *Mason v. Fox*, Cro. Jac. 631., and see Vin. Ab. Tit. Amendment.

before judgment have had it so entered. When some of the counts in a declaration are defective, and the verdict is general, the general rule as to amending the *postea* is settled.\* Defective pleadings, the acts of a party or his counsel, of a judge or the court, cannot be amended after judgment.†

But it is argued that the House can only look at the record as it is brought before them, and that it is not competent for the Plaintiff in error to show how it originally stood. This cannot be by estoppel, for he was neither party nor privy to the amendment.‡ But here the record, as sent up, shows the amendment.

By the statute, the amendment should be made by the Judges in which the record is. In error from a judgment in the Common Pleas to the King's Bench, the record itself is removed, and not a transcript §; and they, as a court of error,

\* *Eddowes v. Hopkins*, Doug. 377, 378., and see the Court Rules of M. 1654, § 21, K.B. and 1654, C.P. Barnes, 478. Willes, 443, and 1 Durnf. & East, 542; and, for particular cases determined according to the above rules, see Doug. 722. 1 H. Blac. 78. 6 Durnf. & East, 692. 3 Maule & Sel. 110. 2 Chit. Rep. 351. 1 Marsh. 382. 5 Taunt. 820, S. C. 7 Moore, 269.

† *Blackamore's Case*, 8 Rep. 310. *Mason v. Fox q. s. Green v. Miller*, 2 B. & Adol. 781.

‡ Com. Dig. tit. Estoppel.

§ See the Year Books of 40 Ass. 29. 22 Ed. 3. 6 pl. 24. Fitz, Nat. Brev. tit. Writ of Error, 20. F. 1 Rol. Abr. tit. Error, 752, 753. 3 D'Anv. Abr. tit. Error. P. a. Vin. Abr. tit. Error, P. Bac. Abr. tit. Error, B.2.; and Com. Dig. tit. Pleader, 3 B. 13. And in support of the same position, see the cases in Yelv. 6. Cro. Eliz. 891, S. C. Godb. 375. Latch, 198. S. C. Cro. Car. 575. 3 Lev. 196. 1 Lord Raym. 427. 1 Salk. 321. S. C. Cowp. 843. and the Entries in 2 Saund. 98—215. 7 Went. 80, 81, 82. And for cases in which the application to amend was made to the Court of K. B., see 8 Co. 162 (a). 2 Rol.



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should have seen whether the error to be amended was the misprision of the clerk. The record was not in the Court of C. P. when they professed to amend it, and the judgment was reversed in the K. B. before the judgment-roll was amended in the C. P., and the amendment was made after a lapse of several terms, which is contrary to settled authority. *Harrison v. King*.\*

For the Defendant in error, *Mr. Campbell*.

The House cannot look beyond the amended roll; and if they could, the opinion and decision of both the courts below was in favour of the Defendant in error upon the first count of the declaration. As to the power of the Court of C. P. to make the amendment, they clearly had it; for the record itself was not sent up to the K. B., but only a transcript; and when amended, the Court of K. B. was bound to amend their roll accordingly. It was in substance only a misprision of the clerk, which was amendable under the statutes, and it is the practice to amend the *postea* by the Judges' notes, and this may be done even after writ of error brought.† In *Free v. Burgoyne*‡, where a similar question arose, Lord Lyndhurst said that the court below might amend the record, and that the House

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Rep. 471. 2 Stra. 837. 5 Burr. 2730. 3 Durnf. & East, 659—749. 3 Maule and Sel. 591, and 4 Maule & Sel. 94.

\* 1 B. & A. 161., and see 1 Chit. Rep. 283 (a). 5 Tau. 86. 3 T. R. 749.

† See 3 T. R. 349. 659. 749. 6 Moore, 135. 3 Bro. & Bi. 65. and 9 Pri. 432. 6 Bing. 100. Doe v. Dyshall, 1 Moore & Payne, 430. Friend v. D. of Richmond, Hard. 505. Wood v. Mathew, Pop. 102. Sir W. Jones, 9. 2 Roll. Rep. 471. Cro. Jac. 627. Cro. Car. 574. Salk. 49. 269. Franklin v. Reeves, Ca. temp. Hard. 118. Barnes, C. P. 7. Stra. 869. Burr. 2730. Thickwood v. Wright, 1 H. B. 642. Usher v. Dancy, 4 M. & S. 94.

‡ In D. P. ante, vol. ii. N. S. But this *dictum* is not reported.

would afterwards amend the transcript. In *Dunbar v. Hitchcock* \*, an amendment which was considered substantial was made by the Court of K. B. after the record had been sent up to the House of Lords.

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In all cases of writs of error from the judgments of any of the superior courts, it is the practice, notwithstanding the words of the statute (27 Eliz.), not to remove the record, but a transcript.

This practice prevails in cases of writs of error from the C. P. to the K. B., and the Court of C. P. possess as much power over their records as the K. B. or any other court. The authorities and practice are decisive; and, if so, upon the record as it now stands the verdict and judgment is entered upon the first count of the declaration, and there is no error.

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In the course of the argument, Lord Tenterden observed that the question was, whether a court of error could enquire into the propriety of an amendment made by the court below in its own record: that the agreement† of the Judges in the court below to state the facts as to the amendment on the record would not give jurisdiction to the House to entertain a writ of error upon a matter which might be considered as interlocutory and not a final judgment.

The following questions were proposed by the House to his Majesty's Judges, viz.:—First, whether it is competent to a court of error to examine the propriety of an amendment of the record made by the court below, being a court of record, the order

\* 3 M. & S. 591. See 5 Tau. 820. † See 7 B. & C. 895.

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for the amendment being sent up as part of the record? Secondly, whether, supposing it to be competent, an amendment made by the court of record, in which the action was originally brought, in the manner and under circumstances similar to those stated in the case of *Mellish v. Richardson*, would be lawfully made?

The opinion of the Judges was delivered by Bayley, J. Upon the first of these questions, his Majesty's judges are of opinion, that it is not competent to a court of error to examine the propriety of an amendment of the record made by the court below, being a court of record, although the order for the amendment is sent up as part of the record.

The proper object of a writ of error is to remove the final judgment of the court below for the revision of the superior court, in order that such court, from the premises contained in the record of the inferior court, may either affirm or reverse the judgment, as they draw the same or a different conclusion from that which has been pronounced by the court below.

These premises are the pleadings between the parties, the proper continuance of the suit and process, the finding of the jury upon an issue in fact, if any such has been joined, and lastly, the judgment of the inferior court.

All these premises, from which such judgment has been derived, the parties to the suit below have the right *ex debito justitiæ* to have upon the record; but the orders or rules for amendment of proceedings made by a court in the progress of a suit therein depending, do not fall within the description of any part of the record, but such

orders are strictly and properly matters of practice in the progress of the cause, regulated by the power of amendment which the courts of law possess, either by the common law, or by the statutes of amendment which have been from time to time enacted by the legislature for that purpose.

The practice of the courts below is a matter which belongs by law to the exclusive discretion of the court itself, it being presumed that such practice will be controlled by a sound legal discretion; it is therefore left to their own government alone, without any appeal to or revision by a superior court. And we cannot but observe, that no precedent has been cited at the bar in which an entry similar to that contended for by the Plaintiff in error is to be found.

So strictly has the law considered that the pleadings in the suit, and the judgment proceeding thereon, shall form the only grounds of the record, that when it was found expedient that the opinion in point of law of the judge who tried the cause should be made the subject of revision by a superior court, the statute of Westminster the second (13 Edw. 1.) expressly gave authority for that purpose by a bill of exceptions.

We think, therefore, that it is not competent for the superior court to examine into the propriety of the amendment, which is left to the sole discretion of the court by which it has been made. And if this be so, then the circumstances of the orders for the amendment being put upon the record in this instance, cannot have the effect of giving competency to the superior court to revise the propriety of such amendment; for, if the grounds of the amendment are not in themselves removable

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by the writ of error, and if the parties to the suit have not *ex debito justitiæ* the right to put the rules and orders for the amendments upon record, then the superior court would have or would not have authority to enquire into the propriety of the amendments, according as the inferior court did or did not return in the particular instance the order by which the amendment is made.

One of his Majesty's Judges has felt some doubt and difficulty in acceding to this opinion ; but, upon the whole, acquiesces in its propriety.

Such being the opinion of the Judges on the first question submitted to them by your Lordships, it becomes unnecessary for them to offer any upon the second.

After this opinion had been delivered,

*Lord Tenterden* said, that he was authorised to state, that the Lord Chancellor (Lord Lyndhurst) and Lord Eldon concurred with him in agreeing to this opinion of the Judges : that this was the first instance of putting on the record of a court of law any thing more than the pleadings and the judgments of the court below ; and that the House could not, nor could any court of error, enquire into the propriety of amendments which were the result of an interlocutory order ; that no precedent of any such practice was to be found ; and that if the precedent were now introduced, it would be attended with needless expense to the parties, and a delay of justice. He therefore moved that the judgment should be affirmed, but without costs.

Judgment affirmed.

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## ENGLAND.

(C. B. &amp; K. B.)

AIMÉ DUVERGIER - - - *Plaintiff.*WILLIAM DORSET FELLOWES - *Defendant.*

In the condition of a bond executed to D. for 10,000*l.*, an agreement was recited to the following effect:— that S. one of the obligors had obtained letters patent for the distillation of potatoes; and that S., together with B. and F., the two other obligors, were engaged in partnership in a distillery, according to the system for which the patents were procured; and that they were desirous of selling and transferring their interest in the concern to a company; and that they had agreed with D., who was a man of large acquaintance and influence, that he should procure persons to take 9000 shares of 50*l.* each, into which the concern was to be divided, and to form a joint stock company, under the title of the Patent Distillery Company, and that to induce D. to exert his influence for such purposes, and to indemnify him for his expenses, S. B. and F. had agreed to pay to D. the sum of 10,000*l.* by three instalments at the times when the calls upon the shares should be paid.

An action of debt being brought by D. upon this bond, F., who was Defendant in the action, pleaded that the letters patent were granted to S. upon the express condition, that if S., his executors, administrators, or assigns, or any persons who should have any right, title, or interest, &c. in the invention, should make any transfer or assignment of the liberty and privilege, or any share of the benefit or profit thereof; or should declare any trust thereof, to or for any number of persons exceeding five; or should open any books for public subscription, &c.; or should act as a corporate body, or should divide the benefit of the letters patent, &c. into any number of shares exceeding five; or should do any act, &c. contrary to the intent, &c. of the statute 6 Geo. 1.; or in case the power, privilege, &c. should

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at any time become vested in, or in trust for more than five persons or their representatives, &c. ; that the letters patent, &c. should be void. And then it was averred in the plea, that the company mentioned in the condition of the bond was intended by the parties thereto at the time of executing the bond to consist of more than five persons, to wit, 10,000 persons, and to be formed for the purpose of using the privileges, &c. in the letters patent mentioned, for the use of such persons exceeding five in their number, &c. ; and that therefore the letters patent were void.

To these pleas a general demurrer was put in by the Plaintiff. Upon argument of these demurrers in C. P., judgment was given for the Defendant ; and this judgment, upon error in K. B. and D. P., was affirmed, upon the ground of the statement in the plea that it was intended by the parties to the bond that the company was to consist of more than five persons to receive the benefit of the letters patent, which being a violation of the condition upon which they were granted, no action could be maintained upon such a bond.

**THIS** was an action of debt on bond, which was set out on oyer by the Defendant as follows :

“ Know all men by these presents, that we,  
 “ Jean Jacques Saintmarc, of the Belmont Dis-  
 “ tillery, Wandsworth Road, in the county of  
 “ Surrey, distiller, Stamp Brooksbank, of Lower  
 “ Grosvenor Street, in the county of Middlesex,  
 “ Esquire, and William Dorset Fellowes, of Brix-  
 “ ton, in the said county of Surrey, Esquire, are  
 “ jointly and severally held and firmly bound to  
 “ Aimé Duvergier, of South Ville, Wandsworth  
 “ Road, aforesaid, Esquire, in the sum of 10,200l.  
 “ of good and lawful money of Great Britain, to  
 “ be paid to the said Aimé Duvergier, or his  
 “ certain attorney, executors, administrators, or  
 “ assigns ; for which payment, to be well and  
 “ faithfully made, we bind ourselves, our and each  
 “ of our heirs, executors, and administrators, firmly

" by these presents, sealed with our seals, dated  
 " the 18th day of July, in the sixth year of the  
 " reign of our Sovereign Lord George the Fourth,  
 " by the grace of God, of the United Kingdom of  
 " Great Britain and Ireland, King, Defender of  
 " the Faith, and in the year of our Lord 1825.  
 " Whereas the said Jean Jacques Saintmarc some-  
 " time since obtained three several letters patent  
 " for the distillation of potatoes ; and whereas the  
 " said Jean Jacques Saintmarc, Stamp Brooksbank,  
 " and William Dorset Fellowes are now engaged  
 " in copartnership together in carrying on a certain  
 " distillery to a very large extent at Vauxhall  
 " aforesaid, called the Belmont Distillery, ac-  
 " cording to the system and method of distilling,  
 " for the use and exercise of which the said several  
 " letters patent were granted to the said Jean  
 " Jacques Saintmarc, and which said distillery  
 " has been erected, set up, and established on  
 " certain leasehold hereditaments and premises  
 " belonging to them, the said Jean Jacques Saint-  
 " marc, Stamp Brooksbank, and William Dorset  
 " Fellowes ; and whereas the said Jean Jacques  
 " Saintmarc, Stamp Brooksbank, and William  
 " Dorset Fellowes, have it in contemplation to  
 " dispose of their shares and interest of, in, and  
 " to the said several patents, and of, in, and to the  
 " distillery premises, plant, and stock in trade in  
 " and upon the same, and to part with the same  
 " to a company to be formed for that purpose ;  
 " and whereas the said Jean Jacques Saintmarc,  
 " Stamp Brooksbank, and William Dorset Fellowes  
 " have applied to and requested the said Aimé  
 " Duvergier to exert his influence amongst his  
 " numerous connections and friends so as to form

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“ such company, intended to be called the Patent  
 “ Distillery Company, who shall appoint directors  
 “ and trustees for the conduct and management of  
 “ the said concern, and that such directors shall  
 “ issue, under their hands and seals, ten thousand  
 “ shares, of the value of 50*l.* each share ; and  
 “ whereas the said Aimé Duvergier, in consequence  
 “ of his connection with different merchants,  
 “ brokers, traders, and others in the city of  
 “ London, hath consented and agreed to form the  
 “ said company, to be called the Patent Distillery  
 “ Company, among his own immediate connections  
 “ and friends, and to bring such persons together,  
 “ for the purpose of appointing directors and  
 “ trustees for the government and management of  
 “ such distillery concern, and to procure pur-  
 “ chasers for 9000 shares, of the value of 50*l.* each  
 “ share ; and whereas the said Jean Jacques Saint-  
 “ marc, Stamp Brooksbank, and William Dorset  
 “ Fellowes, in order to induce the said Aimé  
 “ Duvergier to take the trouble of forming such  
 “ company, and to use his influence amongst his  
 “ connections and friends, and to indemnify him  
 “ from the charges and expenses that he may be  
 “ put unto in and about the same, hath proposed  
 “ and agreed, as soon as he or his executors or  
 “ administrators shall have effected such object,  
 “ and procured purchasers for 9000 of such 50*l.*  
 “ shares, and obtained for such company the first  
 “ call upon such shares of 5*l.* each, that they, the  
 “ said Jean Jacques Saintmarc, Stamp Brooksbank,  
 “ and William Dorset Fellowes, their heirs, execu-  
 “ tors, or administrators, or some or one of them,  
 “ shall and will pay to the said Aimé Duvergier, his  
 “ executors, administrators, or assigns, the full sum

“ of 10,000*l.* sterling, by three equal payments or  
 “ instalments of 3,333*l.* 6*s.* 8*d.* : viz., the sum of  
 “ 3,333*l.* 6*s.* 8*d.* so soon as the first instalment on  
 “ such 9000 shares shall have been paid, the sum  
 “ of 3,333*l.* 6*s.* 8*d.* so soon as the second instal-  
 “ ment on the same shares shall have been paid,  
 “ and the remaining sum of 3,333*l.* 6*s.* 8*d.* so soon  
 “ as the third instalment on the same shares shall  
 “ have been paid. Now, therefore, the condition  
 “ of the above written bond or obligation is such,  
 “ that if the above-bounden Jean Jacques Saint-  
 “ marc, Stamp Brooksbank, and William Dorset  
 “ Fellowes, their heirs, executors, or administra-  
 “ tors, or any or either of them, do and shall well  
 “ and truly pay, or cause to be paid, unto the  
 “ above-named Aimé Duvergier, his executors,  
 “ administrators, or assigns the full sum of 10,000*l.*  
 “ of lawful money of Great Britain, in manner  
 “ following : that is to say, the sum of 3,333*l.* 6*s.* 8*d.*,  
 “ part thereof, on the said Aimé Duvergier, his  
 “ executors or administrators, forming the said  
 “ before-mentioned company, and procuring pur-  
 “ chasers for such 9000 shares, and payment of  
 “ the first instalment or call thereon ; the further  
 “ sum of 3,333*l.* 6*s.* 8*d.* on the second instalment  
 “ on such shares having been paid ; and the re-  
 “ maining sum of 3,333*l.* 6*s.* 8*d.* on the third in-  
 “ stalment on the same shares having been paid,  
 “ then the above-written obligation to be void and  
 “ of no effect, or else to be and remain in full force  
 “ and virtue.”

The Defendant, after pleading several pleas, on which issues in fact were taken, pleaded the following pleas.

Fifthly, *actio non* ; because certain of the said

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several letters patent in the said condition of the said supposed writing obligatory mentioned, were letters patent of our Sovereign Lord the King, under the great seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster on a certain day, to wit, on the 20th day of March, in the fifth year of the reign of our Lord the King; whereby, after reciting, amongst other things, that the said Jean Jacques Saintmarc had, by his petition, humbly represented unto our said Lord the King that he was in possession of an invention of improvements in the process of an apparatus for distilling, our said Lord the King gave and granted unto the said Jean Jacques Saintmarc, his executors, administrators, and assigns, his especial licence, full power, sole privilege, and authority, that he the said Jean Jacques Saintmarc, his executors, administrators, and assigns, and every of them, by himself and themselves, or by his and their deputy or deputies, servants or agents, or such others as he the said Jean Jacques Saintmarc, his executors, administrators, or assigns should at any time agree with, and no other, from time to time and at all times thereafter, during the term of years therein expressed, should and lawfully might make, use, exercise, and vend the said invention within that part of the United Kingdom of Great Britain and Ireland called England, our said Lord the King's dominion of Wales, and town of Berwick upon Tweed, in such manner as to him the said Jean Jacques Saintmarc, his executors, administrators, and assigns, or any of them, should in his or their discretion seem meet; and that he the said Jean Jacques Saintmarc,

his executors, administrators, and assigns, should and lawfully might have and enjoy the whole profit, benefit, commodity, and advantage from time to time coming, growing, accruing, and arising by reason of the said invention for and during the term of years therein mentioned, to have, hold, exercise, and enjoy the said licence, powers, privileges, and advantages therein before granted, or mentioned to be granted, unto the said Jean Jacques Saintmarc, for and during and until the full end and term of fourteen years from the date of the said last-mentioned letters patent next and immediately ensuing, and fully to be complete and ended, according to the statute in such case made and provided ; and it was by the said letters patent provided, and the same were declared “ to be upon “ the express condition that if the said Jean “ Jacques Saintmarc, his executors or adminis- “ trators, or any person or persons who should or “ might at any time or times thereafter during the “ continuance of that grant have or claim any “ right, title, or interest in law or equity of, in, or “ to the power, privilege, and authority of the sole “ use and benefit of the said invention thereby “ granted, should make any transfer or assignment, “ or any pretended transfer or assignment, of the “ said liberty and privilege, or any share or shares “ of the benefit or profit thereof, or should declare “ any trust thereof to or for any number of persons “ exceeding the number of five, or should open or “ cause to be opened any book or books, for public “ subscription, to be made by any number of “ persons exceeding the number of five, in order “ to the raising any sum or sums of money under “ pretence of carrying on the said liberty or pri-

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“vilege thereby granted, or should by him or  
 “themselves, or his or their agents or servants,  
 “receive any sum or sums of money whatsoever,  
 “of any number of persons exceeding in the  
 “whole the number of five, for such or the like  
 “intents and purposes, or should presume to act  
 “as a corporate body, or should divide the benefit  
 “of the said last-mentioned letters patent, or the  
 “liberties and privileges thereby granted, into any  
 “number of shares exceeding the number of five,  
 “or should commit or do, or procure to be com-  
 “mitted or done, any act, matter, or thing, what-  
 “soever, during such time as such person or per-  
 “sons should have any right or title, either in law  
 “or equity, in or to the same premises, which  
 “would be contrary to the true intent and mean-  
 “ing of a certain act of parliament made in the  
 “sixth year of the reign of the late King George  
 “the First, entitled ‘An Act for better securing  
 “‘certain powers and privileges intended to be  
 “‘granted by his Majesty, by two charters for  
 “‘assurance of ships and merchandizes at sea,  
 “‘and for lending money upon bottomry, and for  
 “‘restraining several extravagant and unwarrant-  
 “‘able practices therein mentioned,’ or in case  
 “the said power, privilege, or authority, should at  
 “any time thereafter become vested in or in trust  
 “for more than the number of five persons, or  
 “their representatives, at any one time, reckoning  
 “executors or administrators as and for the single  
 “person whom they represent, as to such interest  
 “as they were or should be entitled to in right of  
 “such their testator or intestate, that then, and in  
 “any of the said cases, those letters patent and  
 “all liberties and advantages whatsoever thereby

“granted should utterly cease and become void,  
 “any thing therein before contained to the con-  
 “trary thereof in anywise notwithstanding, as by  
 “the said letters patent, which said letters patent  
 “the Defendant brought into court, might more  
 “fully appear. And the said Defendant further  
 “said, that others of the said letters patent in the  
 “said condition of the said writing obligatory  
 “mentioned, were and are certain letters patent of  
 “our said Lord the King, under the seal of our  
 “said Lord the King, appointed by the treaty of  
 “Union, to be used instead of the grand seal of  
 “Scotland, bearing date on a certain day, to wit,  
 “the 26th day of February, in the fifth year  
 “aforesaid, by which last-mentioned letters patent  
 “our said Lord the King gave and granted to the  
 “said Jean Jacques Saintmarc, his executors, ad-  
 “ministrators, and assigns, by themselves, or such  
 “other person as he or they might appoint or  
 “agree with, and no others, from time to time and  
 “at all times thereafter during the term of years  
 “in the said last-mentioned letters patent ex-  
 “pressed, that they might lawfully make, use,  
 “exercise, and vend an invention therein men-  
 “tioned of improvements in the process of and  
 “apparatus for distilling within that part of the  
 “United Kingdom of Great Britain and Ireland  
 “called Scotland, in such manner as to the said  
 “Jean Jacques Saintmarc, his executors, adminis-  
 “trators, and assigns, or any of them, should in  
 “his discretion seem meet.”

Then followed the extent and conditions of the Scotch patent, which were the same as in the patent for England.

“And the said Defendant further said, that

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“ the said several terms of fourteen years each  
 “ in the said letters patent mentioned at the time  
 “ of the making of the said supposed writing ob-  
 “ ligatory were and yet are unexpired, and that  
 “ the said company in the said condition of the  
 “ said supposed writing obligatory mentioned was  
 “ meant and intended by the said Jean Jacques  
 “ Saintmarc, the said Plaintiff and Defendant, at  
 “ the time of making of the said supposed writing  
 “ obligatory, to consist of more than five persons,  
 “ to wit, 10,000 persons, and to be formed for the  
 “ purposes, amongst other things, of using, ex-  
 “ ercising, and enjoying the said exclusive liberties  
 “ and privileges in the said two several letters  
 “ patent in the said condition and in this plea  
 “ mentioned, for the use and benefit of the said  
 “ persons so exceeding the number of five in that  
 “ part of the said United Kingdom called England,  
 “ and in that part thereof called Scotland respec-  
 “ tively, under colour of the said letters patent  
 “ respectively, to wit, at, &c.; and so the Defend-  
 “ ant said that the said supposed writing obligatory  
 “ was and is void in law, and this the said De-  
 “ fendant was ready to verify : wherefore, &c.

“ Sixthly, *actio non* ; because certain of the  
 “ said several letters patent in the said condition  
 “ of the said supposed writing obligatory men-  
 “ tioned, were letters patent of our Sovereign  
 “ Lord the now King, under the great seal of the  
 “ United Kingdom of Great Britain and Ireland,  
 “ bearing date at Westminster on a certain day, to  
 “ wit, the 20th day of March, in the fifth year of  
 “ the reign of our Sovereign Lord the King, con-  
 “ taining the like matters and things, and the like  
 “ proviso, and to the same effect, as the said letters

" patent in the said fifth plea first mentioned, as by  
 " the said letters patent which the said Defendant  
 " produced to the court might more fully appear.  
 " And the Defendant further said, that the said  
 " term of fourteen years in the said last-mentioned  
 " letters patent mentioned at the time of the  
 " making of the said supposed writing obligatory  
 " was and yet is unexpired ; and that the said  
 " Company in the said condition of the said sup-  
 " posed writing obligatory mentioned was, at the  
 " time of the making thereof, intended by the said  
 " Plaintiff and Defendant to consist of more than  
 " five persons, to wit, 10,000 persons, and to be  
 " formed for the purpose, amongst other things,  
 " of using, exercising, and enjoying the said ex-  
 " clusive liberties and privileges in the said last-  
 " mentioned letters patent mentioned for the use  
 " and benefit of the said persons so exceeding the  
 " number of five, in that part of the United King-  
 " dom called England, under colour of the said  
 " last-mentioned letters patent, by means of which  
 " premises, in this plea mentioned, the said sup-  
 " posed writing obligatory was and is wholly void ;  
 " and this the said defendant was ready to verify :  
 " wherefore, &c.

" Seventhly, and lastly, that certain of the  
 " said letters patent in the said condition of the  
 " said supposed writing obligatory mentioned,  
 " were letters patent of our Sovereign Lord the  
 " now King, under the great seal of the United  
 " Kingdom of Great Britain and Ireland, bearing  
 " date at Westminster on a certain day, to wit,  
 " the 20th day of March, in the fifth year of the  
 " reign of our said Lord the King, containing  
 " therein the like matters and things, and the

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“ like proviso, and to the same effect, as the said  
 “ letters patent in the said fifth plea first men-  
 “ tioned, as by the said last-mentioned letters  
 “ patent which the said Defendant produced to  
 “ the Court might more fully appear. And the  
 “ Defendant further said, that the said term of  
 “ fourteen years in the said last-mentioned letters  
 “ patent mentioned, at the time of the making of  
 “ the said supposed writing obligatory, was and  
 “ yet is unexpired, and that the said Company in  
 “ the said condition of the said supposed writing  
 “ obligatory mentioned was, by the said Jean  
 “ Jacques Saintmarc, the said Stamp Brooksbank,  
 “ the said Defendant, and the said Plaintiff; in-  
 “ tended at the time of the making the said sup-  
 “ posed writing obligatory, to consist of more than  
 “ five persons, and to be formed for the purpose,  
 “ amongst other things, of using, exercising, and  
 “ enjoying the said exclusive liberties and privi-  
 “ leges in the said last-mentioned letters patent  
 “ mentioned for the use and benefit of the said  
 “ persons so exceeding the number of five, in that  
 “ part of the United Kingdom called England,  
 “ under colour of the said letters patent, and of  
 “ the acting as a corporate body, and dividing the  
 “ benefit of the said last-mentioned letters patent,  
 “ and the liberties and privileges thereby granted,  
 “ into divers shares, exceeding the number of five,  
 “ to wit, 10,000 shares, to be transferable and as-  
 “ signable, without any charter from our Lord the  
 “ King; and that before the time of the making  
 “ of the said supposed writing obligatory, to wit,  
 “ on, &c. at, &c., it was corruptly and illegally  
 “ agreed, by and between the said Plaintiff and  
 “ the said Jean Jacques Saintmarc, the said Stamp

“ Brooksbank, and the said Defendant, that the  
 “ said Plaintiff should form such company as in  
 “ this plea mentioned, for the purpose in this plea  
 “ mentioned, and should sell and dispose of divers,  
 “ to wit, 9000 of such shares, as in this plea men-  
 “ tioned, being the shares in the said condition of  
 “ the said supposed writing obligatory mentioned,  
 “ and should cause divers large sums of money  
 “ to be subscribed by public subscription, by  
 “ numbers of persons exceeding five, to wit, 9000  
 “ persons, in order to the raising a large sum of  
 “ money, to wit, 450,000*l.*, under pretence of  
 “ carrying on the said liberty or privilege (amongst  
 “ other things) by the said last-mentioned letters  
 “ patent granted; such money to be in part  
 “ received by the said Jean Jacques Saintmarc,  
 “ Stamp Brooksbank, and the said Defendant, for  
 “ the purpose of carrying on the said liberty and  
 “ privilege for the benefit of the said last-men-  
 “ tioned persons so exceeding five, and that the  
 “ said Jean Jacques Saintmarc, the said Stamp  
 “ Brooksbank, and the said Defendant, should, in  
 “ consideration thereof, pay to the said Plaintiff  
 “ the sum of 10,000*l.* of lawful money of Great  
 “ Britain, in the manner in the said condition of  
 “ the said supposed writing obligatory mentioned;  
 “ and that, for securing the payment of the sum  
 “ of 10,000*l.*, the said Defendant should make  
 “ and seal, and as his act and deed deliver, to the  
 “ said Plaintiff, a writing obligatory in the penal  
 “ sum of 10,200*l.*, conditioned for the payment of  
 “ the said sum of 10,000*l.* in manner aforesaid;  
 “ and the Defendant further said, that in pur-  
 “ suance of the said corrupt and unlawful agree-  
 “ ment, the said Defendant afterwards, to wit, on,

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“ &c., at, &c., made and sealed, and as his act  
 “ and deed delivered the said supposed writing  
 “ obligatory in the said declaration mentioned,  
 “ and the said Plaintiff then and there accepted  
 “ and received the same of and from the said  
 “ Defendant, upon the said corrupt and unlawful  
 “ agreement, by means of which premises in this  
 “ plea mentioned the said supposed writing ob-  
 “ ligatory was and is wholly void; and this the  
 “ said Defendant was ready to verify: where-  
 “ fore, &c.”

There was a general demurrer to these three last pleas, and a joinder in demurrer. The demurrer came on to be argued in the Common Pleas, in Michaelmas Term, 1828, and the Court gave judgment for the Defendant. A writ of error was brought upon this judgment into the Court of King's Bench, and the cause coming on for argument in Easter Term, 1830, the Court, without hearing the argument at large, confirmed the judgment of the Common Pleas, not on the grounds on which that judgment was given, upon the validity of which the Judges of the King's Bench gave no opinion, but upon the ground that it was stated in the sixth plea, that the Company was intended by the Plaintiff and Defendant to consist of more than five persons, to receive the benefit of the letters patent, which was contrary to the terms on which they were granted; and that, therefore, the Plaintiff could not maintain an action on the bond.

For the Plaintiff in error, *Mr. Follett* and *Mr. Smirke*.

The Plaintiff's right of action is on the obligatory part of the bond: the condition of the bond

will not prevent the Plaintiff from suing on the bond, unless it be an illegal condition. There is nothing illegal in the proposed formation of the association or company described in the pleas and the condition of the bond. There is nothing illegal in the Plaintiff's endeavours to form a company of a greater number than five, to receive the benefit of the letters patent; and it does not appear that the Plaintiff had any knowledge of the restriction contained in the letters patent, as to the number of persons to be entitled to receive the benefit of them.

The making shares transferable will not alone constitute an illegal society.\* A claim to be a corporation is not of itself illegal.† If the condition is impossible, the bond becomes a simple bond without condition.‡ The statute 6 G. 1. was repealed before the execution of the bond. *The King v. Carwood* §, and *the King v. Dodd* ||, were cases under the statute. In *the King v. Webb*, where the indictment charged a case similar to that made by the pleas in this action, it was held that the case was not within the statute. In *Pratt v. Hutchinson*, it was observed by Bayley J., that the plea did not allege that the society was prejudicial to the public. Nor does this case come within the observation of Abbot C. J., in *Josephs v. Palmer*, since there is nothing to show that the parties contemplated a bargaining about an act of

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\* See Co. 3 Inst. 181. *King v. Webb*, 14 East, 406. *Pratt v. Hutchinson*; 15 East, 511. *Davies v. Hawkins*, 3 M. & S. 488. *Josephs v. Palmer*, 3 B. & C. 639. *Nockills v. Crosby*, 3 B. & C. 814.

† Co. Ent. 427. ‡ Touchs. 372. Bac. Abr. Oblig. E. 1.  
 § 2 Ld. Raym. 1361. || 9 East, 516.

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parliament. There is nothing in the pleas to show that the undertaking is illegal.

The case was argued before the Judges, but the counsel for the Defendant in error was not heard.

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*Lord Tenterden.* — The Judges agree that the judgment of the Court below ought to be affirmed; and the majority of them were not Judges when the judgments below were given, and cannot, therefore, by previous opinions be influenced in their judgment. The pleas were held sufficient in the Court below to bar the action. The condition of the patent is so expressed as to comprehend every case of assignment to any number of persons exceeding five. If the patentee or his agent receives any sum of money from any number of persons exceeding five, for the purpose of dividing with them the benefit of the patent, it is provided that it shall be void. According to the condition of the bond, the Plaintiff is to procure persons to take 9000 shares, and to form a company, to whom the business then carried on under the patent by the Plaintiff in error, with two other persons, was to be assigned. According to this condition the Plaintiff in error does not become entitled to any payment under the bond, unless he forms a company and procures 9000 shares to be taken, and obtains payment of the first instalment. If the Plaintiff had stated the condition of the bond in his declaration, it would have been open to demurrer, and it cannot be material, whether the matter appears to the Court upon the declaration, or is brought under their notice by the plea. The fifth and sixth pleas aver the intention of the parties to vest the interest in more than five persons. The seventh

plea avers, in addition, that it was intended that the Company should act as a corporate body, and divide the benefit of the letters patent. It is not necessary that both grounds of the pleas should be made out. If both are illegal, it is sufficient that either should be made out. If one of the pleas is good, it is sufficient to sustain the judgment of the Court below. The object of the bond is such, that the Plaintiff cannot be entitled to the money claimed in the action, unless he has done acts which violate the condition of the patent. He is to procure payment of instalments from persons who, being more than five, could not have any benefit of the payment; and the object of the instrument on which the Plaintiff intends to recover is to invite such fruitless payment. It is said that it does not appear that the Plaintiff knew the condition of the letters patent. If he was ignorant, it might be answered that it was his own fault. But the effect upon the public would be the same, although it were admitted that he was ignorant of the illegality of his invitation to the public.

The question is, whether the benefit can be obtained in a court of justice of a bond with a condition which proposes to violate the law. This would not be consonant to the principles of the law of England, or of reason and justice, to give encouragement to parties to induce others to become dupes, by paying money for that from which they can derive no advantage.

Judgment affirmed, with 80% costs.

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## ENGLAND.

(COURT OF CHANCERY.)

WILLIAM NICOL - - - - - *Appellant.*

SIR ROBERT WILLIAMS VAUGHAN, His Majesty's Attorney General, JOHN BELLENDEN KER, and Others - - - - -	}	<i>Respondents.</i>
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Under a decree for the administration of assets, N., a creditor, brought in before the Master a claim upon a bond of E. K. the testatrix, and M. K. her sister, for 12,000*l.*, whereupon, at the instance of the parties in the suit, it was directed that N. should be examined upon interrogatories, &c. Upon his examination he deposed, that the bond was given partly for money lent, and partly for services, but was unable to state the proportions. It appeared also that he had received monies on account of E. K. and M. K., and that he had taken memorandums for some of his payments, but had no vouchers for the payments, that no accounts were kept, and no settlement took place before the execution of the bond, at which time the vouchers were destroyed.

The Master, by his report, certified that N. was the confidential friend and adviser of Lady E. K. for many years before her death, and was in the habit of raising money for her use by procuring loans from C. and Co., who were her bankers, and joining with E. K., and her sister M. K., in securities to C. and Co.: that in 1813, 2000*l.* was borrowed of C. and Co. by E. K. and that N. joined in a bond to secure the repayment: that, on the 15th day of July, 1815, E. K. and M. K., by the agency of N., borrowed 10,000*l.* of C. and Co. the repayment of which was secured by the joint bond of N., as surety, with E. K. and M. K.: that the bond for 12,000*l.* was executed on the same day: that the solicitors of E. K. and M. K. were not consulted, nor any professional person

present, when the bond was executed : and that it had been submitted to him, under these circumstances, and from the evidence of letters produced, that the bond for 12,000*l.* was an indemnity or counter-security.

The Master also found and certified, that E. K., by her will, bequeathed to N. a sum of 2000*l.* for his services, and upon consideration of the examination, the letters, &c., he certified his opinion that the bond was not a bond of indemnity, but a voluntary bond given to N. as a bounty by E. K. and M. K., without any consideration having been paid or given for the same. The Plaintiffs in the cause excepted to the report, on the ground that it ought to have certified that the bond was given as an indemnity. N. also excepted to it, upon the ground that it ought to have certified that the bond was given, partly for services, and partly for money lent.

N. died in 1828, leaving the Appellant his personal representative.

The cause was heard, in 1829, before the Master of the Rolls upon the exceptions, &c., when issues were directed, 1. Whether the bond, or as to any and what part thereof, was for services performed by N., &c., or as to any and what part for money lent, &c. 2. Whether it was executed as a bond of indemnity to N., in respect of the bond of 10,000*l.* to C. and Co., in which N. was a co-obligor, or in respect of any other engagement into which N. had entered as a security for E. K. and M. K. 3. Whether it was intended as a gift, &c. Upon appeal against the order directing these issues, it was held in D. P., that issues ought not to have been directed, but that the Court below ought to have decided upon the evidence in the cause, whether it was a bond of indemnity, or for consideration, or gratuitous, or otherwise.

In pursuance of this judgment, the case having been brought before the Master of the Rolls, it was, by his order, declared that the bond as to 10,000*l.* was a counter-security, and as to 2000*l.* was a gift. Upon appeal against this order, it was reversed so far as regarded the declaration that the bond as to 10,000*l.* was a counter-security ; the House being of opinion that the burden of proof as to this fact was, upon those who desired to set aside the bond.

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**THIS** was an appeal against an order made by the Master of the Rolls, respecting a bond executed by the Ladies Essex and Mary Ker to



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the late Mr. Nicol the bookseller, under the circumstances stated in the report of a former stage of this case (*ante*, Vol. V. p. 505.). By a former order, issues had been directed by the Master of the Rolls in substance to try whether the bond was voluntary, or gratuitous, or for services performed; or whether partly and to what extent for services, and partly and to what extent as a gratuity.

The order directing these issues was, upon appeal to the House of Lords, reversed by an order dated the 14th of October, 1831, as stated in the above report.

In pursuance of the above judgment of the House of Lords, the exception of the Respondent, Sir Robert Williams Vaughan, to the Master's report, was again set down to be argued before the Master of the Rolls; and the Appellant, as the administrator of his father, at the same time presented a petition to come on to be heard with the argument on the Respondent's exception, praying that the Master's report might be absolutely confirmed.

The Respondent's exception, and the Appellant's petition, came on to be heard before the Master of the Rolls on the 24th day of November, 1831; and the same having stood over for judgment, his Honour, by an order dated on the 2d day of December following, declared that the bond for 12,000*l.* executed by Lady Essex Ker and Lady Mary Ker to George Nicol, bearing date the 15th day of July, 1815, was intended to the extent of 10,000*l.* as a counter security for the engagement into which he had entered as surety for Lady Essex Ker and Lady Mary Ker in the

bond for 10,000*l.*, executed by the said Lady Essex Ker and Lady Mary Ker to Thomas Coutts, bearing date the 15th day of July, 1815, and as to 2000*l.* was intended as a voluntary gift, as a remuneration for his services; and it was ordered, that the exception taken by the Respondent, Sir Robert Williams Vaughan, to the Master's report, bearing date the 21st day of March, 1828, should be overruled, and that the sum of 5*l.* deposited with the Registrar, on setting down the exception to be heard, should be returned to the Respondent; and it was ordered, that it should be referred back to the Master to review his report, according to the foregoing declaration; and that the petition of the Appellant should be dismissed.

This appeal was against the order of the 2d of December, 1831, so far as by such order it was declared that the bond for 12,000*l.*, executed by Lady Essex Ker and Lady Mary Ker to George Nicol, bearing date the 15th day of July, 1815, was intended to the extent of 10,000*l.* as a counter security for the engagement into which he had entered as surety for Lady Essex Ker and Lady Mary Ker in the bond for 10,000*l.*, executed by Lady Essex Ker and Lady Mary Ker to Thomas Coutts, bearing date the 15th day of July, 1815; and so far as it was thereby ordered that the sum of 5*l.* deposited with the Registrar on setting down the said exception to be heard, should be returned to the Respondent, Sir Robert Williams Vaughan; and so far as it was thereby ordered that it should be referred back to the Master to review his report according to the foregoing declaration, and that the petition of the Appellant should be dismissed. The Appellant submitted that the order of the

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2d of December, 1831, ought to have directed that the Master's report of the 21st day of March, 1828, should be absolutely confirmed.

For the Appellant, Sir *Edward Sugden*, Mr. *Tinney* (and Mr. *Wigram*).

For the Respondents, Mr. *Pemberton* and Mr. *Hope*.

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*The Lord Chancellor.*—This case of *Nicol and Vaughan* was an appeal from the judgment of the Master of the Rolls, arising out of a former appeal, in which your Lordships were pleased to reverse the order of his Honour directing certain issues to be tried, and to remit the case back to his Honour to consider the question upon the evidence as it then stood before him. The matter for the decision of your Lordships now is, that which was not disposed of, but sent back to his Honour for his consideration; namely, whether or not upon the evidence before him, this bond, given by the Ladies Kerr to the late Mr. Nicol, was to be considered as a bond of indemnity to the extent of 10,000*l.*, and as a voluntary bond, either voluntary or for services performed, to the extent of the remaining 2000*l.*; or whether it was not a bond to the extent of 12,000*l.* given by those ladies as the obligors of the bond to Mr. George Nicol as the obligee.

His Honour, upon the question and upon consideration of the evidence then in the cause, has come to the conclusion that it was a bond of indemnity to the extent of 10,000*l.*, and to the extent of 2000*l.*, that it was a voluntary bond, given to Mr. Nicol by these ladies; and the opinion which I certainly have formed, and which my noble and

learned friend, whose assistance we had on the former occasion when this case was argued, had also formed, is, that this bond is not to be considered as a bond of indemnity for any part of the amount at all. That opinion has not been shaken by the further consideration of the question, or by the learned and able arguments which were adduced at the bar on the part of the Respondents.

This bond upon the face of it is a money bond for 12,000*l.* and interest—on the face it is clear and plain; and therefore the proof lies on the Respondents in this case, and it is for them to satisfy your Lordships, that it was not what it purports to be—there being no one word of indemnity—nothing pointing towards indemnity—nothing connected with indemnity appearing on the face of the instrument—it was for them to show by sufficient evidence, travelling out of the instrument, that the purpose for which it appears to have been granted was not the real purpose, and that it was intended only to the extent at least of 10,000*l.* of the 12,000*l.* to cover Mr. Nicol's liability, to indemnify him for the liabilities which he had incurred in the transactions with Messrs. Coutts, and to which those ladies, the obligors in the bond, were parties.

Now the evidence which was adduced before his Honour, and the only evidence before your Lordships when we come to consider it altogether, exclusive of Mr. Nicol's own examination, is, in fact, the date of the bond being identical with the date of another bond executed by those ladies to Mr. Coutts, and in which Mr. Nicol was surety for them, in which he joined them, and became also their surety to Mr. Coutts, and which was for

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10,000*l.*, executed on the same day with the bond in question, and executed in the manner I have described. This of itself, this coincidence, is clearly insufficient—the date being the same is an insufficient coincidence; and as to the sum being the same, I still hesitate, and more hesitate now than I did before, in saying that the two instruments were for the same sum.

The one is for 12,000*l.* and the other for 10,000*l.*, and you only can make it out that they are for the same sum by deducting the 2000*l.*, and saying that 10,000*l.* of the 12,000*l.* is to be taken as the same sum in the bond which Mr. Nicol joined in with the ladies to Mr. Coutts, and to that extent, therefore, the sums are identical, and the one is intended as an indemnity against the liability incurred by Mr. Nicol to Mr. Coutts by the other. But then it is to be considered that the giving of a bond for 10,000*l.* is not an indemnity to a party who joins with you in a bond for that amount to another, because there are costs—there is nothing for that—there are the costs which you may incur in consequence of that transaction, and against that the 10,000*l.* bond does not give security. But then, in answer—the pressure of that objection being felt on the part of the Respondents—they argue, “true, the 10,000*l.* is not sufficient “for the costs which are to be taken into the “account, but then the 2000*l.* over the 10,000*l.* “was added for the express purpose of covering “the costs.”

Not to say that this is a most gratuitous assumption made to suit the purpose of the argument, it is negatived both by the finding of the learned Judge in the court below, in the de-

cree appealed from, and by the argument of the parties (the Respondents), who now argue that at your Lordships' bar; it is negatived by the finding in the decree, for that says that the bond was intended to the extent of 10,000*l.* as a counter security for the engagement into which he had entered as surety for Lady Essex and Lady Mary Ker in the bond for 10,000*l.* executed by those ladies to Mr. Coutts, bearing date the 15th day of July, 1815, and as to 2000*l.*, that it was intended as a voluntary gift, as a remuneration for his services. There is not a word about the 2000*l.* being to cover costs, but it is expressly declared that the 10,000*l.* was indemnity, and the 2000*l.* was a voluntary gift for services by him performed. It is equally negatived by the argument of the Respondents themselves, which your Lordships will find in the second folio of their case. So far from taking that view which I am now referring to of the 2000*l.* being added to cover costs, they there contend that Lady Essex Ker, in August, 1819, made and published her will, intending to confirm the gift of 2000*l.* secured by the bond for 12,000*l.*, for which reason she gave a legacy of 2000*l.* to Mr. Nicol: so far from saying, as they now contend, that the 2000*l.* was added to the 10,000*l.* to cover the costs, and to make the whole an indemnity, they there, in precise accordance with the declaration in the decree appealed from, which is an absolute and irreconcilable contradiction to the argument I am now referring to, contend that the 10,000*l.* was indemnity, and the 2000*l.* was gift.

When this question arose, it being quite clear that the proof was upon the Respondents, an application was made for leave to examine Mr. George Nicol

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himself, and he was examined upon interrogatories presented by the parties, the Respondents. It was also stated in the order, that it was by consent of parties that Mr. Nicol was to be entitled to frame interrogatories for his own examination; he was however examined, he was examined on this subject on the part of the Respondents, and they appear to have moved in that examination, but whether they did or not is immaterial for my purpose; they certainly professed, even in the course of the argument here, that they were desirous of examining him, that they preferred examining him themselves, in order to sift the matter to the bottom. After having elected to examine him themselves, can they, when his examination is taken, turn round and call upon your Lordships, as they appear to have called upon the learned Judge in the court below, to throw that examination of Mr. Nicol entirely out of the cause, and to decide as if he never had been examined, and therefore in their favour, — though if he never had been examined, the matter would have stood as it did, for the correspondence proves nothing one way or the other; if it had not been in the cause, he must have decided against the Respondents, and that the bond was in no degree an indemnity, — but can they call upon your Lordships to dismiss Mr. Nicol's examination altogether, and to decide either, as if it were not in the cause, and therefore to decide for them, or to decide as if being in the cause the result of the examination had proved favourable to them? — that is impossible; for, unless the examination is disbelieved altogether, there is an end of the question, for he completely negatives indemnity from the beginning

to the end of his long examination. He denies that there was any such view taken of the matter ; he states that the ladies knew perfectly well the whole transaction in which they were engaged ; he states that it was given in no respect as a counter security, but was given partly from kindness, partly from gratitude towards him, and in part, though apparently in a small part, in respect of an account of monies advanced by him to them, and which they owed him at the time when they executed that bond to him for the whole sum of 12,000*l*. I take it, therefore, in this case, which really admits of no doubt, that we must consider this bond, the proof being thrown on those who impeach it, as a 12,000*l*. bond, and as to those who are to prove it is for indemnity, that we must take it that they have failed in that proof, and that the case remains as it did before this gentleman, Mr. Nicol, was examined. There is nothing whatever that differs this from the ordinary case of a 12,000*l*. bond. It is not contended, as I apprehend — though sometimes in the course of the argument a kind of reference was made to it, but I did not understand it to be contended — that there was any fraud here on the part of Mr. Nicol. In truth it is impossible to ascribe fraud to that gentleman. In this transaction there was no concealment.

It is true that he made no use of the bond during the lifetime of those ladies, and from obvious motives of delicacy, and from an understanding between them, it is quite clear that he was not likely to have done so.

After the death of the survivor, Lady Essex Ker, however, he very soon uses the bond, by depositing it with Mr. Coutts, Mr. Coutts being

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the person who, if there had been any fraud in the transaction, was the most likely to be cognizant of that fraud. He did not wait till Mr. Coutts, who was a very old man, died, but during the lifetime of Mr. Coutts, he used the bond by depositing it with him. And, what also is most material, upon the deposit of that bond from Mr. Coutts, who must have known all the transaction, he obtained an advance not of 2000*l.*, but of 3000*l.* To repel the suspicion of fraud, the observation arising from this loan stares one in the face, and indeed the only suspicious part of the transaction, except one that I am about presently to allude to, the only circumstance that can raise any suspicion of its being indemnity, is the identity of the dates of the two bonds, and the easiest thing in the world on Mr. Nicol's part would have been to have avoided the possibility of any inference being drawn from that fact, by avoiding the fact itself, and having the one bond executed upon a day somewhat distant from the other. Instead of that, he has both executed on the same day, and for a reason which he explains in his examination, that the ladies with great difficulty could be got to attend to business, and particularly business of that description, law business, and therefore it was more convenient that both transactions should take place at one and the same time.

A legacy was left to Mr. Nicol by Lady Essex Ker to the amount of 2000*l.*, and it was left to him for his services, in so many words for the services rendered by him to her, stating it generally for his services, without saying what they were. Now she survived her sister somewhere about a year and a half, and no reference is made to the

2000*l.* before given, which there would have been, on the supposition that the 2000*l.* was gift and the 10,000*l.* was indemnity, and it not being pretended that she was not in perfect possession of her faculties at the time when she made her will, it not being pretended that she did not know the whole transaction, and understand it at the time when she entered into it (the earlier transaction), I think that the 2000*l.* being left for his services, without any reference to a former gift, can be accounted for in no other way than upon the supposition that Lady Essex Ker considered that by that 12,000*l.* Mr. Nicol had been too little paid, and that he having continued the same friendly assistance to her after the death of her sister, Lady Mary, had entitled himself to a further testimony of gratitude at her hands.

There was some reference made in the course of the argument to the cases of *Huguenin v. Baseley* \* ; and *Lord Selsey v. Rhodes*.† The latter of those cases, *Lord Selsey v. Rhodes*, was before the same learned Judge who decided this case in the Court below ; and the former case, it is well known, was decided many years ago by Lord Eldon. I really can find no bearing of those cases upon the present. That of *Huguenin v. Baseley* was clearly put on fraud and misrepresentation ; and Lord Eldon, in his judgment, admits that if the deeds had been the pure, voluntary, and well understood acts of the mind of the party, the Court would not have set them aside. If, however, they are not the pure and well understood acts of

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\* 14 Ves. 273.

† 2 Sim. & Stu. p. 41. and in D. P. reported, *ante*, *New Series*, vol. i. p. 1.

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the mind of the party, then, says his Lordship, the Court will set them aside. And he put it on the ground that Mrs. Huguenin did not understand the instruments she was executing, and that the Defendant did not give her the information he was bound to give her before he suffered her to execute these deeds. *Lord Selsey v. Rhodes*, — was the case of a steward having obtained a beneficial lease from his employer — his Honour lays it down, and most correctly, that there is no rule of law to prevent a steward receiving a beneficial lease from his employer, but he must show that he gave the full consideration which it would have been his duty to take from a stranger; or if he claims it as a testimony of the bounty of his employer, he is bound to make out that his employer had all the knowledge from him, which he the steward had as to the value of the lease, and the other circumstances necessary for him to know; the extent of the term, and the extent of the bounty which he was bestowing upon him by granting him that lease.

Now, upon those propositions, there can be no pretence whatever to entertain the slightest doubt, but they do not appear to me to bear on the present case. Those cases were cited, for the purpose of showing that the proof is not on the party seeking to set aside such an instrument, but that the proof of its not being an indemnity is upon the party setting up the bond. But I am clearly of opinion that there is nothing to be found, within the four corners of either of those cases, which at all goes to establish so extravagant a proposition. The bond on the face of it is clear and plain, and purports to be for 12,000*l.* in money, — it is for those who

seek to set aside that bond—it is for those who seek to construe it in a different way, and to read it as if it were not what it purports to be, but something else,—it is for them to show your Lordships, by sufficient evidence, and not by surmise and conjecture, or merely endeavouring to raise a suspicion, that it is in reality a transaction different from what on its face it appears to be.

I stated that there was one circumstance in this case, but for which, I conceive, there never would have existed a moment's doubt respecting this transaction,—and that is, that the bond was unfortunately not prepared by the man of business usually employed by the Ladies Essex and Mary Ker. They do not appear at that time to have had a professional man regularly in their employ. A respectable gentleman of the name of Moore—Mr. Daniel Moore—appears to have been engaged by them in some law concerns formerly, but he does not seem to have been by them regularly employed as their professional agent. It is unfortunate that there was not a professional man employed by them regularly, and who ought, if there had been such a one, undoubtedly, to have been the person employed in preference to Mr. Nicol's (the obligee's) solicitor. Whether the bond was one of the common printed forms I do not know, but it is in the common form, and it was prepared by Messrs. Blagrove and Walter, and attested by one of them. Mr. Nicol employed them to prepare it, and, but for that circumstance, I really think there never could have been, from beginning to end, the least doubt or suspicion entertained of this transaction. But I am very far from saying that it is a circumstance which ought

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to influence the opinion which the House is to form upon the case. The peculiarity in the habits of the parties, the very close intimacy which prevailed between them and Mr. Nicol, — and their not having regularly employed a professional man at that time, — in all probability will appear sufficient to account for that difficulty, the only one which I can perceive in this transaction.

Upon the argument of this case on the former occasion, I was of opinion, that it was impossible to call upon your Lordships to adopt the inference drawn by the Master of the Rolls from the supposed coincidence of the bonds, but we then had before us only the question of whether or not certain issues should be tried; we had not the question what conclusion ought to be drawn by his Honour, he having at that time drawn no conclusion, but sent it to be tried by a jury. Upon further consideration and fuller argument, I am of the same opinion now which I entertained at that time; namely, that this bond is to be taken as the Master reported it, and that the exception taken by the Respondents to the Master's report ought to have been over-ruled by his Honour. According to that view, this House should reverse so much of the decree appealed from, as declares the bond for 12,000*l.*, executed by the Ladies Essex and Mary Ker, bearing date the 15th day of July, 1815, was intended to the extent of 10,000*l.*, as a counter security for the engagement into which Mr. Nicol had entered as surety for the Ladies Essex and Mary Ker in the bond for 10,000*l.*, executed by the same ladies on the same day (the 15th of July, 1815); and so far also as the same decree ordered that the sum of 5*l.*, deposited with the

registrar on setting down the exceptions to be heard, should be returned to the Respondent, Sir Robert Williams Vaughan; and also so far as the decree ordered that it should be referred back to the Master to review his report according to the declaration; and the report of the Master of the 21st day of March, 1828, should be directed to be absolutely confirmed.

I stated, when this question was argued, that it would be satisfactory to me to have the benefit of the opinion of my noble and learned friend, whose assistance we had upon the former argument of the appeal respecting the trial of the issues, before your Lordships finally decided the question. — I have communicated with him, he has reconsidered the case very fully, and he remains entirely of the opinion which I expressed, as far as it was necessary to be expressed, on the former occasion, and which he, as far as his observations then went, confirmed; and he is more clearly of opinion, upon the evidence as it now stands, that the judgment of the Court below, so far as I have stated, is wrong; and, therefore, to that extent ought to be reversed.

Judgment reversed.

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(COURT OF CHANCERY.)

Sir CHARLES COCKERELL, Baronet, HENRY TRAIL, Esquire, Sir CHARLES BLOUNT, Baronet, The Most Noble GEORGE Duke of Marlborough, and James BLACK- STONE, Doctor of Laws - - -	}	<i>Appellants,</i>
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FRANCIS CHOLMELEY, Esquire - - *Respondent.*

E. by his will devised his manors, lands, &c. in trust for his son C. E. during his life, without impeachment of waste, remainder to trustees during the life of his son, to preserve, &c., remainder to the use of the first and other sons of C. E. successively in tail male, remainder to the second son of the testator in like manner, remainder to T. E., the daughter of the testator, for life, remainder to her first and other sons in like manner.

A power was given to the trustees by the will, with the concurrence of the person in possession, under the limitations to sell or exchange all or any parts of the manors, lands, tenements, wood-grounds, &c., with their appurtenances, &c., and for that purpose to revoke the uses, &c. After the death of the testator, and while C. E. was in possession under the limitation, an indenture was executed, to which the widow of the testator, the surviving trustee of his will, C. E. his eldest son, and M. a purchaser of White Knights, an estate proposed to be sold, with a trustee for the purchaser, were parties. In this deed, among other things it was recited, that C. E., the tenant for life without impeachment of waste, was entitled to the timber and trees standing and growing, and being on the premises to be sold; and that C. E. had agreed to sell the said timber and timber trees to the purchaser at the sum of 2448*l.*, and in pursuance of the agreement, it was among other things witnessed, that in consideration of 13,000*l.* paid to the trustee, he, in exercise of the power, revoked, &c., and appointed the estate, &c. to the trustee for the

purchaser, and in consideration of 2448*l.* paid to C. E., he granted and sold to the purchaser and his trustee all the timber and other trees. Previous to this conveyance, a correspondence had taken place between C. E. and the agent for the purchaser, in which it was agreed that the timber should be taken at a fair valuation, but it was not expressly stipulated that C. E. should receive the purchase money.

Upon the death of C. E., an action was brought by the issue in tail under the limitation, to recover possession of the premises, upon the ground that the appointment under the power was void, and judgment being obtained in the action, a bill was filed by parties interested under the purchase-deed, and mortgagees of the premises, &c. to have the alleged mistake rectified, the deed reformed according to the contract in the letters, and that the tenant in tail might do all acts necessary to confirm the title. This bill was dismissed for want of equity, and upon appeal the decree was affirmed.

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**SIR** Henry Englefield, late of White Knights, in the county of Berks, Baronet, by his last will and testament in writing, executed in the manner required by law for rendering valid devises of freehold estates of inheritance, bearing date the 27th day of November, 1778, gave and devised his manor of Earley, and his manor and mansion-house called White Knights, and all and every his messuages, lands, tenements, wood grounds, rents, tithes, and hereditaments, situate in the parish of Sonning Shinfield Saint Giles, in Reading and Englefield, or elsewhere, in the said county of Berks, unto the Right Honourable Charles Sloane, Lord Cadogan, and Sir Charles Bucke, Baronet, and their heirs, upon the trusts and to the uses and for the ends, intents, and purposes following; that is to say, to the use of trustees, therein named, for a term of 100 years, upon the trusts therein mentioned, and which have long since ceased, and



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subject thereto to the use of the said testator's son, Henry Charles Englefield, for life, without impeachment of waste, with a limitation to the use of the said Charles Sloane, Lord Cadogan, and Sir Charles Bucke, and their heirs, during the life of the said Sir Henry Charles Englefield, upon trust to preserve the contingent uses thereafter limited from being defeated or destroyed, with remainder to the use of the first and other sons successively of the said Henry Charles Englefield in tail male, with remainder to the said testator's second son, Francis Michael Englefield, for his life, and to his first and other sons successively in tail male, in like manner as to the said Henry Charles Englefield and his issue male, with remainder in like manner to the said testator's daughter, Teresa Ann Englefield, for her life, and to her first and other sons in tail male, with divers remainders over. And the said testator declared his will to be that, notwithstanding any of the uses or estates thereinbefore created and limited, it should and might be lawful for the said Charles Sloane, Lord Cadogan, and Sir Charles Bucke, or the survivor of them or the heirs of such survivor, from time to time and at all times during the lives of the said Henry Charles Englefield, Francis Michael Englefield, and Teresa Ann Englefield, or during the life or lives of any or either of them, at the request and by the direction and appointment of the person who for the time being should be in possession of or entitled to the rents and profits of the said hereditaments and premises, by virtue of the limitations therein contained, signified by any deed or writing, deeds or writings, under his or her hand and seal attested by two or more witnesses, to

make sale and dispose of, or to convey in exchange of or for other manors, lands, tenements, and hereditaments, all or any part or parts of the said manors, capital messuage or mansion-house, lands, tenements, wood grounds, rents, tithes, hereditaments, and premises, with their appurtenances, to any person or persons whomsoever, either together or in parcels, for such price or prices in money or any other equivalent as to them the said Charles Sloane, Lord Cadogan, and Sir Charles Bucke, or the survivor of them or the heirs of the survivor, should seem just and reasonable. And to that end the said testator did thereby declare that it should be lawful for the said Charles Sloane, Lord Cadogan, and Sir Charles Bucke, or the survivor of them or the heirs of such survivor, by any deed or deeds, writing or writings under their hands and seals, and delivered in the presence of two or more witnesses, to revoke, determine, and make void all and every or any of the use and uses, trusts, estates, powers, provisoes, and limitations thereinbefore limited, created, provided, and declared of and concerning the same manors, messuages, lands, tenements, wood grounds, rents, tithes, hereditaments, and premises, so to be sold, disposed of, or exchanged, and by the same or any other deed or deeds, writing or writings to be sealed, delivered, and attested, as aforesaid, to limit and appoint the same manors, messuages, lands, tenements, wood grounds, rents, tithes, hereditaments, and premises, whereof the uses shall be so revoked, either unto such purchaser or purchasers, or the person or persons making such exchange or exchanges, and his, her, or their heirs, or otherwise to limit, declare, direct, or appoint such new or other uses or

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trusts of and concerning the same manors, messuages, lands, tenements, wood grounds, rents, tithes, hereditaments, and premises, as shall be requisite and necessary for the executing and effecting such sales, dispositions, or exchanges, and upon payment and receipt of the money arising on the sale of the said premises or any part or parts thereof which shall be absolutely sold as aforesaid, to give and sign proper receipts for the money for which the same shall be so sold, which receipts shall be sufficient discharges to any purchaser or purchasers for the purchase-money for which the same shall be sold, or for so much thereof as in such receipts should be acknowledged or expressed to be received; and such purchaser or purchasers should not afterwards be answerable or accountable for any loss, misapplication, or non-application of such purchase-money or any part thereof; and that when any of the said premises should be sold for a valuable consideration in money, all and every the sums of money arising from such sale or sales should be laid out and disposed of and be invested in the purchase of other freehold estates in England of a clear indefeasible estate of inheritance in fee simple, in possession, and of copyhold lands of inheritance (if any should be intermixed therewith) of as good value as the estates thereby made saleable, and to be settled and conveyed to the same uses, intents, and purposes, as were thereinbefore declared of and concerning the same manors and hereditaments thereby made saleable; and that until the monies arising from such sales should be invested in purchases, the same should be placed on government or real securities or public stocks at interest by the said

Charles Sloane, Lord Cadogan, and Sir Charles Bucke, or the survivor of them, with such consent as aforesaid and testified as aforesaid, and the interest and produce of the money so to be invested in securities should go and be paid to such person or persons and be applied to and for such uses, intents, and purposes, and in such manner as the rents and profits of the lands so to be purchased therewith would go, be payable, or applicable unto in case such purchases were then made.

The testator made and published a codicil to his will, bearing date the 21st day of May, 1779, which did not alter or revoke any of the uses or trusts in the will, declared and expressed of and concerning the manors or estates thereby devised.

The testator died on the 1st day of June, 1780, without revoking or altering his will; and he left Dame Catherine Englefield his widow, Henry Charles Englefield his eldest son, who thereupon became Sir Henry Charles Englefield, Baronet, and Francis Michael Englefield and Teresa Ann Englefield his two other children, and Charles Sloane, Lord Cadogan, and Sir Charles Bucke, the trustees in his will named, him surviving.

Sir Charles Bucke died on the 1st day of January, 1782, whereupon Charles Sloane, Lord Cadogan, became the sole surviving trustee under the will.

Teresa Ann Englefield intermarried in the year 1782, with Francis Cholmeley, of Brandsby in the county of York, and of this marriage the Respondent was the eldest son, and was born in the year 1783.

By an indenture of five parts, bearing date the 12th day of May, 1783, and made between the

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said Sir Henry Charles Englefield of the first part, the said Dame Catherine Englefield widow, of the second part, the said Charles Sloane, Lord Cadogan, of the third part, William Byam Martin, Esquire, of the fourth part, and Martin Yorke, Esquire, of the fifth part, after reciting the hereinbefore recited will of the said Sir Henry Englefield, and also reciting in the words and figures and to the purport and effect following: that is to say,—Whereas the said Charles Sloane, Lord Cadogan, hath by virtue of the said power which was given and reserved to him and the said Sir Charles Bucke deceased, in and by the said recited will of the said Sir Henry Englefield, and in exercise thereof, at the request and by the direction of the said Sir Henry Charles Englefield, testified by this writing under his hand and seal, contracted and agreed with the said William Byam Martin for the sale to him of the said manor or lordship of White Knights, with the rights, royalties, members, and appurtenances, thereto belonging, (except as hereinafter is excepted,) and also of the capital messuage or mansion-house called White Knights, with the outhouses, edifices, buildings, yards, gardens, orchards, and other appurtenances thereto belonging, and the fixtures, household goods, furniture, garden tools, implements, and utensils, in and about the same, and of the messuage, park lands, tithes, and hereditaments situate, lying, and being in the said parish of Sonning, and in the parish of Saint Giles in Reading, in the county of Berks, and hereinafter granted, bargained, and sold, or intended so to be at and for the price or sum of 13,400*l.* : *and the said Sir Henry Charles Englefield, who is tenant for life, without impeach-*

*ment of waste, is entitled to the timber and trees standing and growing and being on the said premises so agreed to be sold to the said William Byam Martin, hath agreed to sell all the said timber and timber trees unto the said William Byam Martin at or for the price or sum of 2448*l*. It was witnessed that in pursuance of the said agreement of the said Charles Sloane, Lord Cadogan, and for carrying the same into execution, and in consideration of the sum of 13,400*l*. to the said Charles Sloane, Lord Cadogan, paid by the said William Byam Martin, with the privity and consent of the said Sir Henry Charles Englefield and Dame Catherine Englefield, testified as therein mentioned, and in consideration of ten shillings to the said Sir Henry Charles Englefield paid by the said William Byam Martin, he the said Charles Sloane, Lord Cadogan, by force and virtue of the said power and authority to him given and limited in and by the hereinbefore recited will, and of all other powers and authorities to him belonging, or in him vested, or enabling him in this behalf, and in exercise and execution thereof, did at the request and by the direction and appointment of Sir Henry Charles Englefield and Dame Catherine Englefield, revoke and determine the uses, &c., limited by the will of Sir Henry Englefield of the manor of White Knights, &c. ; and appointed that the same, with the rights, &c., should from thenceforth remain unto William Byam Martin and Martin Yorke, and the heirs and assigns of Martin Yorke : but as to the estate and interest of Martin Yorke, his heirs and assigns, in trust for William Byam Martin, his heirs and assigns ; and in pursuance of the agreement;*

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and in consideration of the sum of 13,400*l.* to him paid by William Byam Martin for the purchase of the said manor, &c., Lord Cadogan, at the request and by the direction and appointment of Sir Henry Charles Englefield, and with the privity and consent of Dame Catherine Englefield, and at the nomination and appointment of William Byam Martin, granted, &c.; and Sir Henry Charles Englefield and Dame Catherine Englefield, at such nomination and appointment of William Byam Martin, granted, &c., to William Byam Martin and Martin Yorke, and to their heirs, all the manor, &c., with the mansion, titles, &c.; to hold the said manor, with the rights, &c., unto William Byam Martin and Martin Yorke, and the heirs of Martin Yorke, to the use, &c., but as to the estate and interest of Martin Yorke, and his heirs, &c., in trust for William Byam Martin, and his heirs and assigns: and it was further witnessed, that *in consideration of the sum of 2448*l.* to Sir Henry Charles Englefield paid by William Byam Martin, and in consideration of the sum of 10*s.* to Sir Henry Charles Englefield paid by Martin Yorke, Sir Henry Charles Englefield granted and sold unto William Byam Martin and Martin Yorke all the timber and all the fruit and other trees: and it was further witnessed, that for and in consideration of the sum of 13,400*l.*, paid by William Byam Martin to Charles Sloane, Lord Cadogan, and for the other considerations therein mentioned, Sir Henry Charles Englefield bargained, sold, &c., unto William Byam Martin, his executors, administrators, and assigns, all and every the fixtures, household goods, &c.*

Separate receipts for the several sums of 13,400*l.* and 2448*l.* were indorsed on the indenture.

The indenture was afterwards, on the 16th day of the same month of May, acknowledged by Sir Henry Charles Englefield, at Westminster, and duly enrolled in the Court of King's Bench.

The sum of 2448*l.* was accordingly paid over to Sir Henry Charles Englefield, upon the execution of the indenture, for which he gave his own receipt, indorsed upon the indenture, and the sum of 13,400*l.* was paid to Lord Cadogan, as surviving trustee, for which Lord Cadogan gave his own receipt, also indorsed upon the indenture.

The sum of 12,500*l.*, part of the sum of 13,400*l.*, was laid out upon mortgage by Lord Cadogan, with the consent of Sir Henry Charles Englefield, and the residue of the 13,400*l.* was, together with the proceeds of other estates, devised by the will of Sir Henry Englefield, invested in the purchase of 3*l.* per cent. consolidated bank annuities, in the name of Lord Cadogan as surviving trustee.

The hereditaments and estates, devised by the will, consisted of a manor, mansion-house, and about 1300 acres of land near to the town of Reading, of which the manor, mansion-house, and about 250 acres of land, sold as aforesaid, was part.

In April, 1799, the trust monies arising from the sale of the estates devised by the will of Sir Henry Charles Englefield consisted of the 12,500*l.*, secured upon mortgage, and of 4080*l.* 11*s.* 11*d.* 3 per cent. consolidated bank annuities; and Lord Cadogan, with the consent of Sir Henry Charles Englefield, transferred 3470*l.* 1*s.* 2*d.* consolidated bank annuities, part of the sum of

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4080*l.* 11*s.* 11*d.* like annuities, for the redemption of the land tax, and of the land and other hereditaments then remaining unsold; and after such transfer was made, the 4080*l.* 11*s.* 11*d.* consolidated bank annuities was thereby reduced to 601*l.* 10*s.* 9*d.* like annuities.

Dame Catherine Englefield died before the hearing of the appeal.

Francis Michael Englefield also died without leaving any issue; and Francis Cholmeley and Teresa Anne, his wife, were also dead, leaving the Respondent their eldest son them surviving.

The Respondent attained his age of 21 years in 1804.

Lord Cadogan died in the year 1807, leaving his eldest son and heir at law him surviving, Charles Thomas, now Lord Cadogan, a lunatic.

By divers conveyances, assurances, and acts in the law, all the estate and premises purchased by William Byam Martin, and expressed to be conveyed to him by the indenture of the 12th of May, 1783, were conveyed to George Duke of Marlborough, then Marquis of Blandford, and James Blackstone and Thomas Coutts, in trust for him, and were afterwards conveyed to the Appellants, Sir Charles Cockerell and Henry Trail and Archibald Paxton, Esquire, since deceased, and Sir William Paxton, since also deceased, for securing to them respectively divers monies and stocks.

In pursuance of a decree of the Court of Chancery, dated the 6th of April, 1824, made in a cause depending at the hearing of the appeal, wherein Archibald Paxton and Sir William Paxton, and the Appellants, Sir Charles Cockerell and

Henry Trail, were the Complainants, and the Appellants, George Duke of Marlborough, and James Blackstone, together with Thomas Coutts, were the Defendants, the manor, &c. were, on the 17th of July, 1822, put up to sale by auction, before one of the Masters of the Court, at the public sale room, when the Appellant, Sir Charles Richard Blount, was declared the highest bidder for and the purchaser of the manor, mansion-house, and premises, at the price or sum of 37,000*l.*, upon the terms of a good title being made to the premises, and upon other the terms and conditions annexed to the printed particulars of sale.

In the month of March, 1822, Sir Henry Charles Englefield died without issue, leaving the Respondent him surviving, who thereupon became entitled, as tenant in tail male in possession, to all the estates, hereditaments, and premises limited by the will of the testator, Sir Henry Englefield.

In Michaelmas term, 1823, the Respondent commenced his action of formedon in His Majesty's Court of Common Pleas, demanding against Sir William Paxton, and the Appellants, Sir Charles Cockerell and Henry Trail, the manor, mansion-house, and hereditaments devised by the will of Sir Henry Englefield, and comprised in and intended to be granted, limited, and conveyed by the indenture of the 12th day of May, 1783.

The question, whether by the indenture of the 12th of May, 1783, the power of sale, limited by the will, had been well executed, was raised upon the pleadings in the action by demurrer to the replication to the eighth plea of the Appellants,

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Sir Charles Cockerell and Henry Trail, and came on to be argued before the Court of Common Pleas in Trinity term, 1825, when the Court took time to consider the question; and in Michaelmas term, 1825, Lord Chief Justice Best delivered the opinion of the Court, that inasmuch as Lord Cadogan had, by the deed of the 12th of May, 1783, conveyed or intended to convey the manor, mansion-house, and hereditaments, without the timber standing thereon, the power of sale had not been well executed, so as to convey the manor, mansion-house, estate, and premises, or any part thereof, or any interest thereon, to William Byam Martin, and that the deed of the 12th day of May, 1783, was altogether void at law, and judgment was therefore given on the demurrer in favour of the demandant in the action.

The Appellants thereupon filed their bill of complaint in the Court of Chancery on the 11th of February, 1826, thereby stating (amongst other things) the will of Sir Henry Englefield, and the indenture of the 12th of May, 1783; and also stating, that in 1806 doubts had been suggested whether, inasmuch as the timber had not been severed at the date of the execution of the indenture of the 12th of May, 1783, Sir Henry Charles Englefield was entitled to retain the sum of 2448*l.*, and whether the same ought not to have been paid to Earl Cadogan, as surviving trustee, and to have been invested by him upon the like trusts with the residue of the purchase money of the estate and premises; and that in order to obviate any dispute which might thereafter arise by reason of such doubts, Sir Henry Charles Englefield, on the 29th of July, 1806, purchased and transferred into the

name of Earl Cadogan, as trustee, in the books of the governor and company of the Bank of England, the sum of 3681*l.* 4*s.* 3 per cent. consolidated bank annuities, being the amount of the stock which the sum of 2448*l.* would have produced at the time when the same was paid to Sir Henry Charles Englefield, upon the completion of the sale; and also stating an act of parliament, passed in the year 1819, intituled, "An Act for appointing New Trustees for carrying into Effect the Trusts and Powers contained in the Will of the late Sir Henry Englefield, Baronet;" and also stating the death of Sir Henry Charles Englefield. And that in the month of July, 1822, the Respondent presented his petition to the Master of the Rolls, praying that William Cruise, as the surviving trustee under the act of the 59th year of the reign of His late Majesty King George the Third, therein mentioned, should assign to him, or as he should appoint, the sum of 12,500*l.*, secured upon mortgage, and should transfer to him the sum of 106*l.* 4*s.* 9*d.* 3 per cent. consolidated bank annuities. And after stating or referring to some proceedings under the petition, the bill further stated, that at the time of the passing the act of parliament, and also at the time of presenting the petitions and obtaining the orders thereinbefore mentioned, the Respondent had full notice of the indenture of the 12th day of May, 1783, and of the investment of the sum of 2448*l.*, in the purchase of 3 per cent. consolidated annuities in the year 1806, and acquiesced in and confirmed the same. And after charging that very large sums of money, and as to a considerable part thereof with the knowledge of the Respondent, had been from time

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to time laid out and expended by William Byam Martin, and those claiming under him, in the improvement of the hereditaments and premises, by means whereof the value of the hereditaments and premises were much greater than was the value thereof at the time of the sale to William Byam Martin; and also charging that the Respondent ought to be decreed to do all necessary acts for confirming the Appellants' title to the hereditaments and premises, and to be restrained from further proceeding in the action. The bill prayed that it might be declared, that the Appellants were entitled, under the circumstances, to have any defect in the manner in which the sale of the estate and premises to William Byam Martin was carried into effect made good; and that the Respondent might be decreed so to do, and execute all necessary and requisite acts and deeds for confirming and establishing the Appellants' title to the hereditaments and premises comprised in, and intended to be limited and conveyed by, the indenture of the 12th day of May, 1783; and that the Respondent might be restrained by the order and injunction of the Court from further proceedings in the action commenced by him, and from instituting or prosecuting any other proceeding at law against the Appellants for the recovery of the manor, mansion-house, and premises, &c.

The Appellants obtained the common injunction against the Respondent's proceedings at law for want of an answer.

The Respondent, by his answer, insisted that Sir Henry Charles Englefield was not entitled to the price of the timber, and until the same was

severed, had no other estate therein than that of tenant for life; that a large portion of the timber was ornamental; and that there was no other contract than that contained in the indenture of the 12th of May, 1783; that Lord Cadogan never interfered with the sale of the timber; and that the indenture of the 12th of May, 1783, was not executed according to the directions of the will. He admitted that he had some recollection that between July, 1806, and January, 1808, he heard that Sir Henry Charles Englefield transferred some stock to the trust of the Berkshire estates; but that his father and mother were never informed of, and did not know, and that he was not informed of, and did not know, until December, 1822, the nature of the contract of sale, or of the conveyance of the 12th of May, 1783; that such transfer was made without any communication to the Respondent, his father or mother; and that Lord Cadogan never accepted the stock. He further stated, that the indenture of the 12th of May, 1783, is not recited in the act of 59 G. 3.; and that at the time when the act was passed, and the Respondent gave his consent to the same, he was totally ignorant of the nature of the sale or of the indenture of the 12th of May, 1783, or the effect of such conveyance; that the petition presented by the Respondent did not state in any manner, or refer to the indenture of the 12th of May, 1783; that when the petition was presented, and orders made, the Respondent was entirely ignorant of the indenture of the 12th of May, 1783, or the nature or effect thereof; and that there was nothing in the proceedings which could let the Respondent into the knowledge of the transac-

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tions, sale, indenture, and conveyance; and that he never received any portion of the funds. He further insisted, that the substantial and intrinsic value of the premises was not improved by the money laid out by the purchaser, with the exception of what was laid out on the mansion-house. He denied that the money was laid out with his knowledge; and averred that he never saw the property, or was within the county of Berks until 1822, after the death of Sir Henry Charles Englefield.

After the answer of the Respondent was filed, a motion to dissolve the injunction which had been obtained against him was made on his behalf before Lord Chancellor Eldon, who, after argument, postponed his judgment.

Soon afterwards, it being alleged on the part of the Appellants that they had discovered a correspondence between Samuel Pepys Cockerell, whom they alleged to be the agent of William Byam Martin and Sir Henry Charles Englefield, which took place previous to the execution of the indenture of the 12th of May, 1783, in which correspondence it was alleged that a contract was contained for the purchase of the manor, mansion, and other hereditaments, free from the vice of the contract contained in the indenture of the 12th of May, 1783, it was agreed that the correspondence should be delivered to Lord Eldon, and that he should consider the case as if the bill had been amended, by stating the correspondence. The correspondence was accordingly delivered to Lord Eldon, who, taking the correspondence into his consideration, gave his judgment in writing, and dissolved the injunction.

The Respondent thereupon proceeded in the action, and several issues were tried, in all of which he was successful; and he obtained final judgment in the action on the 20th of June, 1828.

The Appellants then amended their bill by setting forth the correspondence\*, and stated

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\* *Original Letters and Copies of Letters, as set forth in the Bill, respecting the Treaty for the Purchase of White Knights, in 1782, which were found in the Office of the late Mr. Cockerell, in the year 1827.*

No. 1.

MR. PEARSON presents his compliments to Mr. Cockerell, and inclosed sends him a letter or order for Mr. Simeon, to show Mr. Martin that part of the estate which he is in treaty about; therefore it will be necessary that Mr. Martin should attend himself in person. Sir Henry Englefield wishes the intended visit may be on Wednesday or Thursday, as on those days the house and place will be most at liberty; and he begs that, at all events, as little as possible may be said on the subject. — Mr. P. has only just received the inclosed.

Sunday, 4 o'clock.

No. 2.

Mr. R. Simeon's compliments to Mr. Martin; his father is absent in London, and will not return till Friday, and Mr. R. S. has it not in his power to furnish him with the particulars wanted. — If Mr. M. will go to Farmer Elliot's, at the upper lodge of Sir Harry's grounds, he will, on showing this note, show him the lands and house, if Mr. Neville has quitted.

Forbury, Wednesday morning.

To — Martin, Esq.

No. 3.

Sir,

Causham, July 29th, 1782.

In answer to the proposal which you brought me, I must inform you that the park and farm adjoining are now let for 400 guineas per annum; the house standing at 100*l.*, and the land let at a fair farmer price. As the house is in perfect re-



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(amongst other things) that William Byam Martin had employed Samuel Pepys Cockerell to treat as

pair, the beauty of the place is eminent, and the manorial rights (which I would part with with the place) extensive, besides ponds on the commons, and a large coppice in the park unlet, and so not reckoned into the rent aforesaid, I cannot think of parting with it for less than 12,000 guineas, exclusive of the timber, which, at a fair valuation, will, I fancy, come to about 2000*l.* more. As I am in no sort of necessity of parting with the place (nor can without an act of parliament), I certainly shall not take less than that sum. I shall be in town in a few days, when I shall see you, and hope to find the Clerkenwell business settled.

I am, Sir,

Your obedient servant,

H. C. ENGLEFIELD.

No. 4.

Mr. Cockerell presents his respectful compliments to Sir Harry Englefield, and acquaints him that he has seen Mr. Martin, who is much obliged by the very candid manner in which Sir Harry has explained the particulars of White Knights, and which, under the circumstances of caution and reserve desired of and complied with by Mr. Martin, is the only ground he has to enable him to judge of the purchase. Mr. Cockerell has it therefore in commission from Mr. Martin to make an offer to Sir Harry Englefield, which, including every advantage and desirable circumstance wherewith the place abounds, as to beauty, situation, and neighbourhood, is, in his opinion, a very large price for the estate; considering it not as an estate, but as a respectable and pleasurable residence for a gentleman of fortune. The particulars of the estate, as Mr. Cockerell understands it is to be disposed of, and which Mr. Martin's offer means to comprise, are as follows; viz.

*Tithe Free.*

The house and offices, gardens and homestead,  
 with the fixtures, furniture, crop, plants, &c.,  
 in their present state, as let to Mr. Neville,  
 and since let to Mr. Mills (except the books of  
 the library and family pictures)

A. B. P.

6 0 12

his agent for the purchase of the estate and premises, and for that purpose Samuel Pepys Cock-

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*Tithe free, except two or three Acres in the Park.*

	A.	R.	P.
The park, including every thing within the pales, that is, the lands, plantations, with the fir and other young trees, the coppice with the under-wood, the waters, &c. - - -	176	1	31
The lands on each side the avenue, called Butcher's Close, Swing Swang, Pond Close, and a field by Doles Green, let to Mr. Lewis	34	1	9
The farm-house and offices, and the lands north and east of the park, called Porters, Upper Power and Heath, also let to Mr. Lewis -	31	1	39
Total acres -	248	1	11

Now let at per annum 420*l*.

The lordship of the manor, as far as it respects the absolute, unlimited, and exclusive control of it in regard to game, hunting, fishing, appointing gamekeepers, &c., with unlimited right of common, within the manor, &c., as amply as to the estate belongs.

Mr. Cockerell presumes he is correct in these particulars; and that when liberty can be had for a minute enquiry, the estate will answer this representation: upon that idea, Mr. Martin, wishing to pursue the same liberal mode of treating he has received from Sir Harry Englefield, has commissioned Mr. Cockerell to offer 12,000*l*. as the fullest price the place can possibly bear, and to take the timber, not being fir trees or other young trees, forming a part of the plantation, at a fair value, according to the custom of the country.

If Sir Harry Englefield thinks this offer worth his acceptance, and that Mr. Martin can have possession of the house and estate at Michaelmas next, the purchase money will be ready and deposited on that day; and will be paid as soon as the title is made out and approved, and the necessary conveyances can be completed. Mr. Martin will not have any great objection (for Sir Harry Englefield's accommodation) to Mr. Mills's continuing in possession of the house till the end of October, provided the land is not fed or stocked after Michaelmas, nor the manure carried off the premises; and if Sir Harry chooses for the present to leave the library on the premises, Mr. Martin

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erell applied to Joseph Pearson, the London solicitor of Sir Henry Charles Englefield and his

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will be answerable for the care of the books while in his possession.

Mr. Cockerell requests the favour of Sir Harry Englefield's early answer, as Mr. Martin remains in town a few days longer, in order to provide for the payment of the purchase money, in case Sir Harry Englefield accepts his offer.

Stratton Street, August 26th, 1782.

#### No. 5.

Sir H. Englefield is much obliged to Mr. Cockerell for his letter received this morning, and called on Mr. C. to give him an answer in person.

The terms which Sir H. E. proposed yesterday to Mr. M. he cannot depart from, as they were fixed by him at a time he had not thought of giving the furniture in with the house; he, therefore, cannot take less than 12,000 guineas, exclusive of the timber.

The manorial rights were meant to go, (except as to the property of the soil,) in the fullest extent Sir H. E. possesses them.

As Mr. Mills is tenant to Sir H. E. under the idea of a three years' lease, and has no house at present in town, Sir H. cannot, in common decency, think of asking him to quit sooner than Christmas. As to the land in Lewis's hands, that may be entered on at Michaelmas. There are a few more acres in the park than you mention, but how many am not quite sure, for the reasons I told you.

As to the books, I should be happy to give Mr. Martin the use of them for a reasonable time; nor would I wish to pull the pictures from their places, till Mr. M. has others, or something else to put in their place.

I must at all events repeat my request of secrecy, and ask your pardon for ending like a letter, what I began like a note.

I am, Sir,

Your obedient humble Servant,

Mr. Cockerell,

HENRY C. ENGLEFIELD.

Stratton Street, Piccadilly, London.

P. S. I am going to Cheltenham, where your answer will find me.

family. And also stating, that it was subsequently agreed between and by Sir Henry Charles Engle-

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BOOKS  
BY  
CHAPMAN & CO.

No. 6.

Sir,

I am very sorry I did not return home on Monday soon enough to have had the honour of seeing you before you left London, as a conversation would probably have prevented you the trouble of the letter I have just had the honour of receiving, in answer to mine of that day, and have settled the business finally, without any thing further on the subject.

*With regard to the offer of 12,000*l.*, I thought it so very large, that I had no doubt of its being accepted; for I understood, from the conversation which passed on the business, that the furniture was thrown in, as being part of the present nominal rent of 400 guineas, as well as some equivalent for the intended abatement of 18*l.* per annum out of the nominal rent to Mr. Nevill, for deficiency of measure rated to him, exclusive of the plantations; as it can hardly be thought, that the coppice and waters can, by any means, be equal to that abatement; nor can buildings, by any sort of estimate, however high, be valued at near thirty years' purchase upon their rack-rent, when every acre of profitable land appertaining is separately considered at the highest improved value it is capable of bearing. The place has, confessedly, superior advantages beyond many others, or I could never have thought of the offer made on the part of Mr. Martin in my last letter; and therefore, I do not presume to mention these circumstances in depreciation of the value of it, but as fair and candid reasons for thinking 12,000*l.* an exceeding and handsome price for the estate. I hope these considerations will excuse my troubling you again, to request the indulgence of a particular account of the land-tax payable at present upon the estate held by Mr. Nevill and Mr. Lewis, at the nominal rent of 400 guineas, and if there are any other outgoings therefrom; and also, that you would please to desire Mr. Simeon to inform me, what is the pound rate at which it is now assessed, and the average rate of the land-tax upon other estates adjoining. I shall then have the honour of sending a final answer on the business; in doing which, I shall be proud to acknowledge the very honourable and candid manner in which Sir Harry Englefield has acted in this business.*

I remain, with respect,

Yours, &amp;c.

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field and Samuel Pepys Cockerell, as such agent, that William Byam Martin should become the

P. S. As the object to a purchaser of White Knights, especially at the price offered, can only be for the residence, it is the house only of which an early possession is wanted, and it would be very desirable to have that a few weeks before or at Christmas; but as to the land let off separately, a good tenant at will in possession would be preferred to the land in hand.

No. 7.

Sir,

Reading, Sept. 12. 1782.

I have been absent, which prevented my writing sooner, and the accident occasioning the delay must be imputed to me, not to Sir Henry Englefield.

The land-tax now paid for the part of Sir Henry's estate proposed to be sold to you, is about 40*l.* yearly; I cannot be minutely exact, not having the rates. I believe some trifling things, not proposed to be sold, are included in the payment I made for him, which was 41*l.* 6*s.* 5*d.* As near as I can calculate the average tax of the liberty, it is about three-fifths on the real rents.

I am, Sir,

Your most obedient servant,

To Samuel Pepys Cockerell, Esq.

RICHARD SIMON.

, Stratton Street, Piccadilly, London.

No. 8.

Sir,

Reading, Sept. 16. 1782.

I received your favour on Friday evening. There was not any post from hence to London on Saturday, and yesterday I was so ill I was not able to write.

Lewis's rent is 147*l.*, and his land-tax is 17*l.* 19*s.* 8½*d.*; and the lands let to Mr. Nevill were, I think, 168*l.* for his land, and his land-tax for the house and the lands is only 24*l.* 14*s.*, or thereabouts. You know already that the general average of the liberty is about three-fifths, by which you will perceive that the present tax paid by Sir Henry is more than a Protestant purchaser will pay.

I am, Sir,

Your most humble servant,

To Samuel Pepys Cockerell, Esq.

RICHARD SIMON.

Stratton Street, London.

purchaser of a certain parcel of land called Foxholes, other part of the hereditaments and pre-

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No. 9.

Sir,

Immediately on the receipt of yours I writ to Mr. Simeon to give you all the information you requested relative to taxes, &c. at White Knights, which I hope you have long received, as I am about to quit this place; I must desire you to direct to me, (if you write within ten days,) at the post office, Grantham.

I should wish to hear as soon as you can, as the determination you make will influence my future destination this autumn.

Cheltenham, Sept. 16. 1782.

I am, Sir,

Your most obedient servant,

Mr. Cockerell, HENRY C. ENGLEFIELD.  
Stratton Street, Piccadilly, London.

No. 10.

Dear Sir,

I have been until this time getting an answer from Mr. Simeon, respecting the land-tax payable on White Knights, which I find somewhat higher than I expected, as from the general average of the land-tax in that liberty it does not appear likely to be reduced below 38l. per cent. upon the present rents, which will leave the net income of the rents, keep up to their present rate, not exceeding 277l. per annum, which is something less than we expected, which was a net 2½ths per cent. on 12,000 guineas. I have therefore delayed a final answer to Sir Henry Englefield until I hear again from you. Enclosed is a copy of what I have written to him by to-night's post, in answer to his letter received to-day, a copy of which I send you on the other side, and I shall expect the pleasure of hearing from you by Tuesday next, and remain, dear Sir,

18th Sept. 1782.

Yours,

W. B. Martin, Esq.,  
Weymouth, Dorset.

S. P. C.

No. 11.

Sir,

Stratton Street, Sept. 18.

I have the honour of your letter of the 16th instant, in answer to which I beg leave to mention that I did not hear from Mr. Simeon concerning the taxes until Thursday last, and then not so explicitly as to enable me to form an accurate idea

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mises demised by the will, in addition to the lands and hereditaments described and enumerated in

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of what it may be reduced to, in consequence of which I wrote to him again by that night's post, and received his answer yesterday; but, as I find the reduction which will be made in the annual rent thereby greater than I expected, I cannot without further powers from Mr. Martin increase the offer already made, which, as it is in my idea beyond the value of the place, with all its advantages, I cannot advise him to advance upon.

I have, however, written to him by to-night's post for his final determination, and hope the delay of a few days will not . inconvenience Sir H. E. in his route for the remainder of the autumn.

I have the honour to be, &c.,

Sir H. Englefield, Bart.

S. P. C.

No. 12.

Dear Sir,

Weymouth, 21st Sept. 1782.

I have been favoured with your letter of the 16th inst.; am much obliged to you for the further enquiries you have been making relative to White Knights, and though they do not prove quite so favourable as we had a right to expect, yet from the accounts I have given of it to Madam Martin, she seems equally with myself disinclined to give it up for the sake of a few pounds. I must, therefore, request you will settle the matter finally, upon a certainty that the lands alone will yield the net sum of 277*l.* *exclusive* of the house and taxes, &c. I mean, that it really yields that sum at *present*, as no one can answer for the future. Should it in the smallest degree be necessary to have the particular limits ascertained, or the land valued, I beg you will employ a reputable land surveyor for that purpose; and, in short, act in such a manner as to prevent all litigation and disputes hereafter, taking care to have the manorial rights settled upon me and my heirs for ever, except the right of soil, which I have consented to remain with Sir Henry; and likewise have the time for taking possession specified, but not to exceed Christmas, as it may require many alterations before I can be comfortably settled in it.

The timber, I conceive, is to be valued by our different agents, according to the custom of that country, not including

the letter of the 26th of August, 1782, in the amended bill mentioned, at the price of 800*l.*,

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shrubs, agreeable to Sir Henry's promise upon that subject. I beg you will make my best compliments acceptable to Mrs. Cockerell, and believe me, at all times, with much regard,

Dear Sir,

To Samuel Pepys Cockerell, Esq.  
London.

Yours, very truly,  
W. B. MARTIN.

No. 13.

Sir,

Stratton Street, 28th Sep. 1782.

I had the honour of writing to you on the 18th instant, directed to be left at the post office, Grantham, which I hope you have received, and by the same post I wrote to Mr. Martin for his final instructions, relative to the treaty for White Knights; my letter followed him to Weymouth, and I have before me his answer, upon which I have now the honour of writing to you.

The confined circumstances under which I have been enabled to form any judgment of the estate, having, in pursuance of your request, necessarily prevented the open enquiries usual on the part of purchasers of estates of this nature, and our only information arising from communications made on your part, in which we have every confidence that can be desired,—it is on that ground only Mr. Martin accedes to the terms required by you for the estate, furniture, &c., as described in my letter to you of the 26th of August, upon the following suppositions:—

That the lands only, let to Mr. Lewis and Mr. Nevill, exclusive of the house, gardens, plantations, pleasure-ground, wood, and waters, are now set to them at a fair farmer price, amounting to 320*l.* per annum, subject only to the land-tax payable upon the said land, including the house, &c., amounting at present to 42*l.* 13*s.* 8½*d.*; and that same may be proportionably reduced, upon the conveyance of the estate to a Protestant purchaser.

That the manorial rights, except the right of soil and holding courts, be conveyed absolutely with the estate; and that possession of the house, &c. be delivered to the purchaser by Christmas-day next at the latest; by which time, if the proper conveyance, if approved and executed, the purchase money to be paid, and, of course, the purchaser to enter from thence



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being at the rate of thirty years' purchase, as therein alleged, upon the rent then paid in respect

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into possession of the rents and profits of the whole. The timber to be taken at a fair valuation, according to the custom of the country.

I shall wait the honour of your answer, which I hope to receive as soon as convenient; and am, Sir, &c.

S. P. COCKERELL.

#### No. 14.

Sir,

York, October 11. 1782.

I am much concerned that so long a space has elapsed since you writ to me, but I have been on a long tour of business, and yours followed me about. I now lose no opportunity of acquainting you, that you seem to have misunderstood a little the state of the White Knight rents. They have hitherto been set to Messrs. Neville and Lewis at 420*l.*; but I informed you, when in town, that a part of the plantation was by mistake accounted into the number of acres supposed to be let; and, therefore, the rents were to be a little sunk, viz. about 15*l.* a year, after a new survey should have been taken, to see exactly how much was taken off by plantation. At the same time I informed you, that all the plantations, the waters, and the coppice in the park, were never let to any body; so that their value (and they contain full thirty acres) was unaccounted for totally in the rent the place was set at. I dare say that you must remember my having explained this to you in town. Therefore, when you say, "the lands only let to Mr. Lewis and Nevill, *exclusive* of house, garden, plantations, pleasure grounds, *woods*, and *waters*, are now set to them at 420*l.* a year," you are, as I have informed you above, in a mistake. Under these circumstances, I have not written to Mr. Mills, the present tenant of the place, as I could not do that till I was well assured of Mr. Martin's being absolutely engaged. Then, indeed, if Mr. Mills should choose to refuse to give me up his lease, he must keep it; but I have not a doubt but that he will do me that favour. As to the furniture, I repeat that I except books and family portraits; which, however, I wish Mr. Martin to have the use, while convenient to him. The manorial rights you are perfectly exact in. The land-tax will not suffer diminution quite so great as the proportion of single to double taxes,

thereof; which sum of 800*l.* being added to the sum of 12,000 guineas, or 12,600*l.*, made the sum

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as some parts are not fully double taxed, but not much. I can only repeat, that you have my honour for the accuracy of every information I have given you in regard to this affair. If I have erred, it has been where I have myself been deceived; and I think I know my affairs enough to be quite sure that no error of any sort of consequence can have been fallen into.

I must repeat my thanks to Mr. Martin and yourself for the very liberal manner in which you have acted; and am, Sir,

Your obliged and obedient,

HENRY C. ENGLEFIELD.

Please to direct your answer to me at Mrs. Isted's, Northampton.

Mr. Cockerell,  
Stratton Street, Piccadilly, London.

## No. 15.

Sir,

I have the honour of your letter of the 11th instant, by which I find myself not quite correct, in omitting to provide for the abatement which I recollect you to have mentioned as having been verbally agreed to on your part, out of the rent paid by Mr. Neville, of about 15*l.* per annum. I have since seen Mr. Martin, to whom I had before mentioned the circumstance of that abatement; he, therefore, will not make any obstacle of that matter, provided the land-tax is at such a rate now as that it may be reduced, upon coming into his hands, to about 25*l.*, including the house, per annum; which, as your letter states that it is not much of the estate is fully double taxed at present, may, I suppose, be very fairly concluded, so that I may state the proposal upon the supposition that the rent for the land only will produce at net 280*l.* per annum, or thereabout. I must again apologise to you, sir, for the awkward manner in which I am obliged to conclude Mr. Martin's offer for the estate, but will not trouble you further on that head, as the motives having been already explained; and will only add that, in the conclusion of this business, I hope you will find as much fairness and liberality from Mr. Martin, as I have already experienced from your candour in the information received at your hands. I have the honour, &c.

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of 13,400*l.* as the whole purchase money to be paid by the said William Byam Martin, exclusive

No. 16.

Sir,

Ecton, October 21st, 1782.

On my arrival here I found your letter, and, in answer to what you say of the land-tax, must inform you of the manner in which Papist property is in our country taxed:—The assessment for the tax is made by liberties, in our parish, which is very large, and the Popish proprietor is considered as having double the number of acres he really possesses; so that, if the liberty consists of 4000 acres, and 1000 are in Papist hands, the rate per acre is made as if the Papist had 2000, and the whole liberty was of 5000 acres. By this means the tax is not quite a double one, as the liberty ought, in strictness, to be assessed to the true number of acres, and then, that sum raised on the Papist, paid again into the Exchequer. Some lands also purchased under trustees named, are not double taxed; and, as the rate has been many years made, the last improved rents are not taxed; the abatement, therefore, on the tax of that part of my estate I mean to sell to Mr. Martin, will not, I should think, be above 15*l.* a year, which would leave the tax about 27*l.* 10*s.*; but of the sum, within a pound, I am not nor can be quite sure, and the diminution may be greater, very possibly, than I now state it.

The net rents of the land, including the coppice and waters, are, however, most certainly, full 280*l.* a year, and would let so (with the abated land-tax) to any tenant whatever.

I am very sorry to find that the report of this business has got so far about that Mr. Mills, my tenant, has written to me to know the truth of it; I this post answer him that I have such an intention, subject, however, entirely to his leave. Your final answer will oblige me, as soon as may be; for, till that time, I cannot request him to give up his lease, nor indeed has he too much time to do it now.

As I write to a man of honour, I have explained the taxes very fully. Whether this business goes on or not, I trust that no advantage will be made of my openness.

I am, Sir,

Your obedient servant,

HENRY C. ENGLEFIELD.

P. S. Direct as before, Ecton, near Northampton.

 Mr. Cockerell,  
Stratton Street, Piccadilly, London.

of the value of the timber. And also stating, that Sir Henry Charles Englefield communicated to

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No. 17.

Sir, Stratton Street, 24th October, 1782.

I have just received the honour of your letter of the 21st instant, and am much obliged by the very candid manner in which you have explained the nature of the assessment of the land-tax, which will probably turn out, in regard to the reduction of it, nearly, if not equal, to the supposition I had formed of it; I have since seen Mr. Martin, who is so much satisfied with the very handsome manner in which every matter relative to the business has been explained by you, that the little difference in the supposed reduction which may happen by the customary manner of rating the land-tax in that liberty, that no objection will be started on that account; and I hope, with this concession on his part, all further trouble to you will be unnecessary, which I am concerned has already been so much.

I am sorry to find that my hint of the treaty had reached Mr. Mills previous to your own intended communication of the business, but I am persuaded Mr. Martin had carefully avoided mentioning it till within these few weeks, that he conceived the business to have been settled; though, from your own very candid conduct in giving every further accounts, to prevent future disappointment, the final conclusion of it has been delayed till now; I hope, however, no inconvenience will arise from this circumstance: and when I have the honour of hearing Mr. Mills has consented to give up his farm, I will direct an agreement for the sale of the estate to be prepared for your approbation, and to be executed by yourself and Mr. Martin, that nothing may intervene to interrupt the future settlement of the business to the satisfaction of all parties.

S. P. COCKERELL.

No. 18.

Sir, Stratton Street, 28th November, 1782.

I received a letter from Sir H. Englefield, dated the 19th instant, respecting the purchase of White Knights, that he wrote to desire you would be so good as to send me an accurate description of White Knights in every thing intended to be conveyed, and such

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Lord Cadogan the treaty and agreement contained in the several letters therein before stated, and the subsequent agreement for the purchase of Foxholes, and requested him to revoke the uses of the will of the said mansion-house, lands, and premises, and to appoint and convey the same to William Byam Martin at the price and for the considerations in the treaty and agreement contained ; and

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other particulars as are necessary to prepare an agreement for the purchase, since which, I have been in daily expectation of the pleasure of hearing from you thereon ; as you have the are-fully acquainted with what circumstances are necessary for that purpose. I shall, therefore, be much obliged to you, if prepared, that you will be so good as to furnish me, by the return of the post or coach on Saturday, to be left at the White Horse Cellar so good, if possible, to send it by one of the

on Sunday, directed in the same manner, in order that I may show it to Mr. Martin's solicitor. I shall go to Reading with Mr. Martin, on and explain what further particulars (if any) should be required, better than by writing. I hope you will pardon this desire of despatch, as it may tend to prevent trouble to the parties, and remain, sir,

Your most obedient, humble servant,  
SAMUEL PEPPYS COCKERELL.

No. 19.

Sir, Reading, 29th November, 1782.

I had your favour this day, and a letter, to the same purpose, from Sir Henry Englefield, very lately ; my unfortunate situation, and my late indisposition, have prevented my looking into Sir Henry's deeds ; as the conveyances are to be executed so soon, I do not see the use of articles. I shall be in London on Tuesday next, at Mr. Bodenham's, in Conduit-street, about two o'clock, and will wait on you for five minutes.

I am, sir, your obedient humble servant,  
(Signed) RICHARD SIMMON.

To Mr. Cockerell, Stratton Street, London.

The value of the timber was ascertained by a joint survey and estimate of the agents of the vendor and purchaser.

that Lord Cadogan approved of, and consented to, and adopted the agreement, and undertook and agreed to execute the necessary deeds for carrying the same into execution. And also stating, that the said purchase and transfer of the sum of 3681*l.* 4*s.*, 3 per cent. consolidated bank annuities was made with the privity and consent of Lord Cadogan, and that he agreed to and accepted the transfer thereof; and that the dividends thereof were from time to time, by his authority and direction, paid and applied to or for the use of Sir Henry Charles Englefield; and that the sums of 3681*l.* 4*s.* and 601*l.* 10*s.* 9*d.*, 3 per cent. consolidated bank annuities, making together the sum of 4282*l.* 14*s.* 4*d.* like annuities remained standing in the name of Lord Cadogan up to and at the time of his death, in the books of the Governor and Company of the Bank of England, upon the trusts and subject to the limitations of the will. And also stating, that the investment of the sum of 2448*l.*, in manner and for the purposes hereinbefore mentioned, was communicated to Francis Cholmeley and Teresa Anne Cholmeley, his wife, the father and mother of the Respondent, and to the Respondent himself, very soon after the investment was made, and was frequently, at or about that time, the subject of conversation in the family of the Respondent, and in his presence. And also stating, that previously to the death of Lord Cadogan, Mr. Richard Nowell, the solicitor of Sir Henry Charles Englefield, at his request and by his direction, prepared a draft of a deed-poll or declaration of trust, intended to be executed by Lord Cadogan, stating how the said sum of 4282*l.* 14*s.* 9*d.*, 3 per cent. consolidated bank

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annuities, had been produced, and declaring that Lord Cadogan held the same upon the trusts then subsisting under the will of Sir Henry Englefield, and that Mr. Richard Nowell afterwards and before the death of Lord Cadogan laid the draft of the proposed deed-poll before the solicitor of Lord Cadogan on his Lordship's behalf, but that Lord Cadogan died before he had executed the same. And also stating, that in pursuance of the directions of the act of parliament, applications were made to the Court of Chancery by and on behalf of Sir Henry Charles Englefield and the Respondent, for the purpose of having the costs of procuring the passing of the act, including the costs of the Respondent, taxed and settled. And in pursuance of an order of the Court, made upon such application, the costs were duly taxed accordingly. And further stating, that in or about the month of November, 1819, and in the month of May, 1820, the said sum of 4282*l.* 14*s.* 9*d.* 3 per cent. consolidated annuities were sold and disposed of, with the privity and consent of the Respondent, and the whole of the proceeds thereof, except a sum of 78*l.* 9*s.* 8*d.*, which was invested in the purchase of 106*l.* 4*s.* 9*d.* like annuities, has since been applied, with the like privity and consent, in defraying the costs of procuring the said act of parliament, and the expenses of an inclosure and exchange of other parts of the lands and hereditaments devised by the will of Sir Henry Englefield, and other charges relating to the said trust estates. And that, in or about the month of June, 1821, Richard Nowell furnished the Respondent, at his instance and request, with a full statement and particular account of the manner in which the

said sum of 428*l.* 14*s.* 9*d.* had been applied and disposed of; and that such account was then in the possession, custody, or power of the Respondent. The bill prayed that it might be declared, that the Appellants were, under the circumstances aforesaid, entitled to the benefit of the said contract for the purchase of the said mansion-house and premises, comprised in and intended to be conveyed by the said indenture of the 12th of May, 1783, and were entitled to have the said contract carried into effect, and to have the said defect in the execution of the said power supplied, and have the said indenture of the 12th of May, 1783, reformed and amended, and made conformable to the said contract and agreement, and to have the said mistake and defect in the said last-mentioned deed rectified and made good, and that the Respondent might be decreed to do and execute all necessary and requisite acts and deeds for confirming and establishing the Plaintiff's title to the said hereditaments and premises, comprised in and intended, or expressed to be limited and conveyed, by the said indenture of the 12th of May, 1783. The Respondent put in his answer to the amended bill on the 27th of October, 1827, and thereby stated his ignorance whether Samuel Pepys Cockerell was the agent of William Byam Martin; that he believed the correspondence was not made known to Lord Cadogan, and that Sir Henry Charles Englefield acted upon his own opinion, and with his own particular views; that Sir Henry Charles Englefield did not request Lord Cadogan to appoint and convey the manor in any other way than as appears by the indenture, separate and distinct from the timber; and that

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Lord Cadogan did not adopt any agreement except that contained in the indenture of the 12th of May, 1783; that he did not know or believe that any mistake was committed in the preparation of the deed, or that such indenture was prepared under such alleged mistake; that the only contract adopted by Lord Cadogan was that contained in the recital of indenture of the 12th of May, 1783; that Lord Cadogan never accepted the transfer of the 3681*l.* 4*s.*, 3 per cents.; and that the dividends were received by Sir Henry Charles Englefield, under an old power of attorney. The Respondent further stated, that one of the issues tried in the action was, whether the said 13,400*l.* and 2448*l.* were placed out at interest, according to the directions of the will, in the name of Earl Cadogan, when the jury found a verdict that the said last-mentioned sums had not been so laid out. And the Judge refused to direct the jury to presume that Lord Cadogan had ever executed, or would have executed, the declaration of trust; and that a new trial was refused. The Respondent further stated by his answer, that when the application was made upon the act 59 G. 3., and when the said 4252*l.* 14*s.* 9*d.*, 3 per cents., were sold out, the Respondent was totally ignorant of the nature of the contract and sale, or of the conveyance; and that at the time of the transfer, in 1806, and at the time of the passing of the act of Parliament, and of presenting the petition to the Master of the Rolls, and order of 1822, Richard Nowell had not the least knowledge of the contents of the indenture of the 12th of May, 1783, &c. He farther insisted, that the sale was improvident and pernicious.

Replication having been filed to the answers of the Respondent, and the cause being at issue, witnesses were examined on the part of the Appellants, and on the part of the Respondent. The cause came on to be heard before the Master of the Rolls on the 17th of March, 1830, when His Honour decreed and ordered that the original and amended bill should be dismissed.

The appeal was against this decree and order.

For the Appellants,

*Mr. Pepys and Mr. Cockerell.*

The letters are sufficient to form a good contract in equity. Reference to a more formal agreement will not prevent letters operating as an agreement, all the terms being specified.

In one case this was carried so far as to be applied where it was manifestly intended that it should not operate as an agreement.\*

If this is not a binding contract on the correspondence, it is one contract by one individual, and not two contracts. It was held at law, that the power was not well executed, because the estate and timber could not be sold distinctly.

Here is one contract by parties interested, with consent of the trustee. It is usual for a tenant for life to deal on behalf of his trustee, and as his agent, the trustee seeing that the contract is not improper.

The deed of 1823 was to carry the agreement into execution. There was no other contract than that upon the letters, and the deed was prepared under a mistake. The tenant for life, Sir H. E., might have cut down the timber, and sold the

\* See *Tawney v. Crowther*, 3 Bro. C. C. 161. 318. and observations of Lord Redesdale on the doctrine. 1 Sch. & Lef. 54. See also *Welford v. Bearley*, 1 Ves. Sen. 8. & 3 Atk. 503.

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estate separately. If sold separately, the land would have sold for less. The contract on the letters is single, on the deed it appears double, because by mistake it was conceived that Sir H. E. was entitled to the timber. The recital of the agreement in the deed is not according to the letters, and cannot alter the contract itself. The money has, in fact, been laid out in the repairs and improvements of the estate, and the remainder-man is placed in the same situation as if the price of the timber had originally been reserved upon trust for him. The Respondent was informed of the nature of the transaction; he was fully apprised of his rights when the remainder vested, and he ought then, if ever, to have complained.

The document furnished to the Respondent in 1808, recites that in substance the sale of the land was made by the trustee, and that the tender was held by the tenant for life. It gave him, therefore, full information of the facts: the money laid out by the Duke of Marlborough in 1814; the appointment of new trustees; the act of parliament; and the costs given in the action of Sir H. Englefield, the Respondent appearing on that occasion; the sale of estate; the death of Sir H. E., and the petition of the Respondent, as tenant in tail, all facts to show acquiescence. The action of form-edon prevailed, upon the ground that the execution of the power invalid at law. We come into a court of equity, because, though invalid at law, we ought to have relief in equity.

The injunction was dissolved by Lord Eldon, upon the ground that a court of equity could not restrain the party from proceeding at law. The Appellant is nevertheless entitled to relief.

As to the contract, the Master of the Rolls says,

“The correspondence, &c. did not contain a proposal and acceptance of all the terms of the “contract.” We complain of this part of the judgment.

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The next ground of complaint refers to what the Master of the Rolls says as to the intention of parties. His observation on this point is answered by the fact, that neither party had any intention as to the mode in which the contract was to be carried into execution. The question is, what is the contract? The deed shows two contracts. This is the foundation of the judgment at law. If we show that the contract was not so, but erroneously introduced in the deed, we show a ground for relief. Where the document of contract is before the Court, they will enforce the execution of it. Here is sufficient ground for relief on the head of mistake. Mistake in the execution of a deed under a power, is not different from any other deed.

That mistakes of this description are rectified in courts of equity, appears by the authorities *Shannon v. Bradstreet*\*, *Wykham v. Wykham*.† Here is a good contract upon the letters. In the letter of July 29. 1782 (No. 3.), the estate is offered “exclusive of the timber.” The letter of the 26th of August, 1782 (No. 4.), enumerates the particulars, and proposes a price, which does not include the timber. The price, for the estate without the timber, and all the terms of the contract, had been settled by the previous correspondence, and the letter of the 28th of September, 1782 (No. 13.), announces the final assent of the

\* 1 Sch. & Lef. 52.

† 18 Ves. 415.

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purchaser. This is sufficient to constitute in equity a contract, *Leigh v. Kennedy*.\*

The Master of the Rolls says, in case of acquiescence, the party must know, not only facts but legal consequences. This is not so ; knowledge of law is presumed. How can he be informed of legal consequences. As to the allegation in the answer of the Respondent, that the sale was improvident, there is no proof.

For the Respondent, *Sir Edward Sugden and Mr. Lynch*.

The Plaintiffs until the last moment did not make up their minds as to the indenture on which they should urge their claim.

The decision at law must govern the case in equity. It proceeded upon a defect in the substance of the execution ; the construction is the same in equity. The question as to what the power permits, is the same in both courts. If the substance is wrong, there is no remedy ; if the substance is right, forms in some cases are supplied. In the trial at law, Littledale J. directed the jury to find, that the money for the timber was not invested in pursuance of the directions of the will. A court of equity would compel the investment of the money in other lands ; there ought to be no sale, except for the purpose of buying another estate. Here is a most improvident sale of the centre of the estate, destroying the value of the rest.

In *Mortlock v. Buller* †, Lord Eldon says, as to a power of sale “ for such price as shall appear “ to be reasonable ; ” that the expression must be construed “ with a view to circumstances, and that

\* 3 Meriv. 441.

† 10 Ves. 309.

“the Court would expect some strong purpose  
“of family prudence justifying the conversion.”

And in *Lord Mahon v. Stanhope* \*, Sir W. Grant cites the passage from Lord Eldon’s judgment with approbation.

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There are few cases in which the tenant for life without issue would not sell the mansion-house, and relieve himself from keeping up the family place. A court of equity would not, however, permit such a sale. The tenant for life cannot so deal with the estate subject to such a power, as to cut timber and then sell the estate, for by repeating such an operation, the tenant for life, by buying estates covered with timber, might put the whole value of the inheritance in his pocket. Again, he could not cut ornamental timber, nor grub up underwood; he must deal providently with it. *Doran v. Wiltshire* † decides, that a tenant for life cannot put in his pocket the value of standing timber.

As to equitable relief, it may be applied if the substance is right, but the form wrong; if the substance is wrong, equity cannot relieve. In *Reid v. Shergold* ‡, it was held that under a power to appoint by will, an appointment by an act *inter vivos*, could not be sustained in equity. There is no difference in construction in equity and law.

The original bill contained no correspondence. The Plaintiffs must always have had it in their hands, but they did not at first rest their case upon it. Now it is said, that upon a deed executed

\* Not reported. See Sir Edward Sugden on Powers, 5th Edition, p. 489. and the Note at the end of the Case.

† 3 Sid. 99.

‡ 10 Ves. 370.

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in 1783, you are not to take the contract as recited in the deed, but to look back to the previous correspondence. That cannot be. But supposing you are to look to the correspondence, it is not a contract; or if a contract, not that of Lord Cadogan.

The first letter, dated Caversham, from which some inference has been drawn as to Lord Cadogan's concurrence, shows that Sir H. Englefield thought he could not sell without an act of parliament.

A contract may be made out from letters, but all judges in equity have regretted that practice, and have struggled to take cases out of that rule.\* As to No. 4., it is a conditional offer of 12,000*l*. In No. 10., no final answer is sent, and therefore no contract. No. 12. is a conditional authority from Mr. Martin, depending upon amount of rent. No. 13. is a conditional acceptance upon suppositions.

The rule in equity is, that there must be clear and plain acceptance of tender, without clogging it with conditions. No. 14. is Sir H. Englefield's answer, showing that the suppositions upon which the former letter proceeded were incorrect. It is clear that at that moment no party was bound. No. 15. is still a conditional acceptance. In No. 16., Sir H. E. asks for a final answer, and uses the expression, "whether the matter goes on or not." In No. 17. occurs the expression of sorrow, that "the final conclusion of the agreement has been delayed till now. When I hear," &c., and the condition is still to depend on Mr.

\* See 3 Taunt. 172. and *Kennedy v. Lee*, 3 Meriv. 441.

Mills quitting ; up to the last moment there was a condition, and therefore no concluded contract.

Lord Cadogan did not appoint Sir H. Englefield as his agent, and if he adopted any contract, it was not that appearing from the letters. The contract tendered by the deed for the adoption of the trustee recites a sale of the timber as the property of the tenant for life. If the purchase-money for the timber as well as the estate, had been originally paid to Lord Cadogan, the mistake might have been treated as form only, and therefore set right in equity. But there is no mistake, such as a court of equity can remedy ; the parties were ignorant of their rights, and asserted claims which were unfounded, but they intended to do what they have done : the deed perfects the intention which the parties really had. The valuation shows that the timber was valued between Sir H. Englefield and the purchaser, and not between the trustees and the purchaser \*, when an unusual covenant was inserted ; and the deed being bad at law, relief was refused in equity. No attempt was ever made to set up in equity leases which were bad at law, as commencing *in futuro*, and yet they come very close to the right, being right in substance. Suppose it to be assumed that there was a contract in 1783, by the effect of the correspondence which might have been executed, but that the trustee adopted only a portion of that contract, and a part of it, viz. the price of the timber, was expressly withdrawn from the trustee, that would make the whole transaction invalid, and the trustee, being dead, cannot now adopt it.

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\* 3 Swans. 685.



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If, therefore, there was an entire contract in the correspondence, they must make out that the trustee sold the whole, land and timber. Now their only mode of showing the adoption is by the deed, and by that deed it appears that he did not intermeddle or concern himself with the timber. The effect of this would be to make the trustee answerable for money which he never received. Unless they show adoption by the trustee, relief cannot be had in equity.

Every thing regarding the execution of a power must be done at the time ; for example, where “ sealed and delivered ” is required, and the attestation expresses “ signed and delivered,” though the witnesses subsequently attest the fact that it was sealed and delivered, it will not do. So, where enrolment is required, subsequent enrolment will not do. The transaction of 1806 did not confirm the previous agreement, for Lord Cadogan had not sold the timber ; it was therefore a new and different contract ; and the finding of the jury, by the direction of Mr. J. Littledale, was, that the investment was not according to the will. There was no acceptance by Lord Cadogan of the transfer, and dividends were received under an old power.

As to acquiescence : first, the answer shows that the Respondent knew nothing of the transfer in 1806, or the contract, or the conveyance in 1783. The indenture of 1783 is not set forth in the act of parliament, which contains no notice of the transaction.

It is argued, on the other side, that Sir H. E. retained the money in ignorance of the law ; and, therefore, it is a mistake which should be set right in equity. We say, if he knew the facts, he did

not know the law; therefore, do not deprive him of his legal rights. Their argument, makes our right available.

The doctrine stated by the Master of the Rolls is correct, — that a man cannot confirm an act unless he knows that he has rights which the confirmation will conclude, although you may draw an inference that, from a knowledge of a fact, the party knew the right he had in consequence.

*Mr. Lynch.*—The trustee, and not the tenant for life, was intrusted with this sale, its propriety, price, &c. If there be a proposal by letter, unconditionally and absolutely accepted, that is an agreement within the statute. But there is evidence in the letters themselves that the parties did not mean to be bound. There is no contract. But if there be a contract, it is the tenant for life who contracts, and not the trustee. There is no previous authority from the trustee to the tenant for life to act as his agent, and no subsequent adoption.

The deed shows a different contract,—a different price and property. But this contract (admitting it to be one) could not have been enforced in equity at the time, for it would have been a breach of trust.

As to the equity founded on mistake : the foundation of the argument on the other side must be, that there was a contract, and that it was a proper one, and made by the trustee. But it is the purchaser's deed. There is no reference in the deed to the correspondence; and the contract recited is totally opposed to the one alleged.

As to defective execution : this is a case of non-execution; and courts of equity do not relieve

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against non-execution. Here they call upon a court of equity to remodel the contract altogether. In cases fit for relief, courts of equity always ask whether the contract is for the benefit of the remainder-man, before they remedy a defect in the execution of power.

It is argued that the defect was cured in 1806. That admits that the conveyance in 1783 was wrong, and the attempted cure was not approved by the trustee.

As to the supposed acquiescence of the Respondent: their own witness proves that the Respondent was ignorant of his rights; that he did not know that his estate tail was not displaced.

*The Lord Chancellor.*—This is a case of very great hardship. I stated at the hearing, that being impressed with the hardship of the case, though I certainly felt that the decree of the Court below ought to be affirmed, I should postpone advising your Lordships as to the manner in which it appeared to me it ought to be disposed of, until I had an opportunity of again attentively looking into it, in order to see if there was any possibility of discovering means consistently with the facts of the case, and consistently with the undoubted law of the case, of coming to an opposite conclusion: that attempt, on my part, has been in vain; and I certainly am prepared to advise your Lordships to affirm the decree. When I have said this, I entirely agree with his Honour, from whom this judgment came by appeal, in thinking that it is one of the hardest cases, taking it altogether, that I have ever seen, even in that chapter of law, the execution of powers, which is so fruitful, at various times, in cases of this description.

Having said so much, it is proper that I should add (and it is what I threw out at the hearing of the case), that nothing can be more unfit than to throw any imputation whatever against the gentleman who has taken advantage of the law of the land as it is. He is not bound to forego that advantage. He is not only not bound to forego that advantage, but unless he be a person to whom many thousand pounds are a matter of no importance, as regards either his own interest, or the interest of his family, it would be a piece of romantic folly, in my opinion, in him to forego that advantage which the law of the land has given him. I think it fit to state this, in case any imputation should appear to rest on the character of that gentleman for having only prosecuted what are his undoubted rights. In the circumstances of the case, nevertheless, I shall certainly recommend to your Lordships not to make any order with respect to costs.

Judgment affirmed.

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NOTE.

The passage in *Mortlock v. Buller*, respecting the powers given to trustees to sell for a reasonable price, &c., as mentioned in the Argument, p. 158. occurs in Vesey's Reports, vol. x. p. 309. as follows:—

“That expression must be construed, at least in a question between the trustees and the *cestuy que trust*, after they have with due diligence examined [the propriety of the investment]. The object of the sale must be to invest the money in the purchase of another estate to be settled to the same uses, and they are not to be satisfied with probability upon that, but it ought to be with reference to an object at that time

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"supposed practicable; or at least this court would expect  
"some strong purpose of family prudence justifying the con-  
"version, if it is likely to continue money."

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In Lord *Mahon* v. Earl *Stanhope*, 9th March, 1809, Sir William Grant said that the trustee must have a reasonable prospect of being able to lay out that price in the purchase of an estate which, from some circumstance or other, is more eligible than the estate proposed to be sold, for else it would be a mere conversion of land into money. This, he said, was very clearly laid down by the present Lord Chancellor, in the case of *Mortlock* v. *Buller*, where the power was exactly of the same kind as that contained in the settlement before him.

Note extracted from Sir Edward Sugden's *Treatise on Powers*, p. 489. 5th edit.

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## ENGLAND.

(EXCHEQUER CHAMBER.)

DAVID COLVIN, JAMES COL-	} <i>Plaintiffs in Error;</i>
VIN, RICHARD CAMPBELL	
BAZETT, and ALEXANDER	
COLVIN - - - - -	
NICHOLAS NEWBERRY and	} <i>Defendants in Error.</i>
THOMAS STARLING BEN-	
SON - - - - -	

C. and Co., merchants in Calcutta, shipped certain goods on board a vessel, of which A. was the captain and B. the owner. The captain signed the usual bill of lading.

By a contract made between A. and B., A. was appointed to the command of the ship for a voyage from London to Calcutta and back, with liberty to take a cargo, reserving room for 100 tons of goods to be laden on account of the owner. In consideration of which, A. for himself and his executors, &c. agreed to take upon himself the command, and to take the ship into his service for twelve months, and to pay for the use of the ship 25s. per ton per month during the term. But it was further agreed that the bills of exchange which should be given in payment for the freight of the homeward cargo should be made payable to the ship agents in London, as joint trustees for the owner and the captain, to appropriate the proceeds in payment of the balance of freight due under the contract with the owner, and the surplus (if any) to the captain. It was further agreed that an agent for the owner should be put on board, and have control over the stores of the ship and the provisions, &c.; and in case of any breach of any part of the contract by the captain, the agent had power to remove him and appoint another captain. It was also provided, in case the ship should be detained more than ninety days at Calcutta, and the captain should not pay

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1000*l.*, in part discharge of the balance of freight, to the agent of the owner—that he should have power to load the ship with a cargo for England on the owner's account, without prejudice, however, to the rights of the owner under the contract with the captain, or any claim in respect of freight, &c.

This contract was shown by the agent for the owner, upon his arrival at Calcutta, to C. and Co., who, acting as the agents both of the owner and the captain, were employed to collect and pay over to the captain freight received upon the carriage of goods from England, and to procure for him freight from Calcutta on the homeward voyage.

The goods shipped by C. and Co. having been partly lost and partly damaged on the voyage from Calcutta to London, an action upon the case was brought by C. and Co. against the owner for the loss and damage, in which a special verdict was found, stating the facts as above set forth.

Upon argument of the case in the King's Bench, judgment was given for the plaintiffs. But on a writ of error to the Exchequer Chamber, this judgment was reversed; and upon a further writ of error to Parliament, the judgment of reversal was affirmed.

**T**HIS was a writ of error arising out of a special action on the case, brought by the Plaintiffs as surviving partners, against the Defendants in error, as surviving owners of the ship *Benson*, for the loss of a part, and damage done to the residue of a cargo of goods.

The first count of the declaration alleged, that the Defendants, and James Capper deceased, before and on the 11th of March, 1817, were owners of a certain ship called the *Benson*, whereof George Betham then was master, and which ship was then in the river Hooghly in the East Indies, and bound on a voyage from thence to the port of London; and that the Defendants, and James Capper, so being owners of the said ship, the Plaintiffs and Alexander Colvin the elder in his lifetime hereto-

fore, to wit, on the same day and year aforesaid, in parts beyond the seas, to wit, in the river Hooghly aforesaid, shipped, &c. on board of the said ship, whereof, &c., divers goods and merchandizes, to wit, 2171 bags of sugar, and 191 chests of indigo, of them the said Plaintiffs, and the said Alexander Colvin the elder, then being in good order and well conditioned, and of a large value, to wit, of the value of 20,000*l.* of lawful money of Great Britain, to be securely carried and conveyed in and on board of the said ship from the river Hooghly aforesaid to the port of London aforesaid; and there, to wit, at the port of London aforesaid, to be safely and securely delivered in the like good order and well conditioned, to certain persons commonly called and known by the names and using the style and firm of Messrs. Bazett, Farquhar, Crawford, and Company, or to their assigns, (the act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever excepted,) for certain freight and reward, *payable by bills in that behalf*: and although the said goods and merchandizes were then and there had and received by the said George Betham, so being master of the said ship or vessel as aforesaid, in and on board of the said ship or vessel in the river Hooghly aforesaid, to be carried, conveyed, and delivered as aforesaid, yet the said Defendants and the said James Capper, so being owners, &c., not regarding their duty, did not securely carry or convey the said goods and merchandizes, or cause the same to be carried and conveyed in or on board of the said ship or vessel, or otherwise, from the river Hooghly aforesaid.

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to the port of London aforesaid ; nor there, to wit, at the port of London aforesaid, safely and securely deliver the same, or cause the same to be delivered to the said Messrs. Bazett, Farquhar, Crawford, and Company, or to their assigns, (although the said Defendants and the said James Capper were not prevented from so doing by the act of God, the king's enemies, fire, or other dangers or accidents of the seas, rivers, or navigation, of any nature or kind soever,) but on the contrary thereof, they, the said Defendants and the said James Capper, so being owners of the said ship or vessel as aforesaid, so improperly behaved and conducted themselves with respect to the said goods and merchandizes, that by and through the mere carelessness, negligence, misconduct, and default of the said Defendants, and the said James Capper, and their servants in this behalf, a great part of the said goods and merchandizes, being of great value, to wit, of the value of 10,000*l.* of like lawful money, became and was wholly lost to the said Plaintiffs and the said Alexander Colvin the elder ; and also thereby the residue of the said goods and merchandizes, being of great value, to wit, of the value of 10,000*l.* of like lawful money, became and was greatly damaged, lessened in value, and spoiled ; and the said Plaintiffs, and the said Alexander Colvin the elder, lost and were deprived of divers great gains and profits, which might and would otherwise have arisen and accrued to them from the sale thereof, to wit, at London aforesaid.

To this declaration the Defendants pleaded the general issue of not guilty, upon which issue was joined ; and at the trial before Lord Tenterden, C. J., and a special jury, at the London

sittings after Michaelmas term, 1826, a special verdict was found on the *first* count of the declaration, to the following effect; That on the 11th of March, 1817, the said Plaintiffs, and Alexander Colvin the elder, deceased, shipped on board the ship Benson, near Calcutta in the East Indies, then riding at anchor in the river Hooghly, 2171 bags of sugar, and 191 chests of indigo, then being in good order and well conditioned; for which the following bill of lading was signed by George Betham, then being the master of the said ship, under the circumstances hereinafter mentioned:—

“ Shipped, by the grace of God, in good order and  
 “ well conditioned, by Messrs. Colvins, Bazett,  
 “ and Co., in and upon the good ship called the  
 “ Benson, whereof is master, under God, for this  
 “ present voyage, George Betham, and now riding  
 “ at anchor in the river Hooghly, and by God’s  
 “ grace bound for London, to say, 2171 bags of  
 “ sugar, and 191 chests of indigo, being marked  
 “ and numbered in the margin, (where the marks  
 “ and numbers are stated,) and are to be delivered  
 “ in the like good order and well-conditioned at  
 “ the aforesaid port of London (the act of God,  
 “ the king’s enemies, fire, and all and every other  
 “ dangers and accidents of the seas, rivers, and  
 “ navigation, of whatever nature and kind soever,  
 “ excepted), unto Messrs. Bazett, Farquhar, Craw-  
 “ ford, and Co., or to their assigns, freight for the  
 “ said goods being paid by bills. In witness  
 “ whereof, the master or purser of the said ship  
 “ hath affirmed to four bills of lading, all of this  
 “ tenor and date, the one of which four bills being  
 “ accomplished, the other three to stand void;  
 “ and so God send the good ship to her desired

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“ port in safety. Amen. Dated in Calcutta, the  
 “ 11th of March, 1817. George Betham.” And  
 that the said George Betham received the said  
 goods on board the said ship in the said river  
 Hooghly, to be carried and conveyed according to  
 the said bill of lading; that at the time of the  
 said goods being so shipped and received, and the  
 said bill of lading signed, and before that time,  
 the said Defendants and James Capper were the  
 owners of the said ship; and that before the said  
 ship sailed to the East Indies, and whilst they were  
 such owners, the following charterparty, bearing  
 date the 7th day of June, in the year of our Lord  
 1816, was executed by the said Defendant, Thomas  
 Starling Benson, who was then the managing owner  
 of the said ship, and acting on behalf of himself  
 and the other part owners of the said ship, on the  
 one part, and said George Betham of the other  
 part, for the said ship Benson: — “ This charter-  
 “ party of affreightment, made and concluded in  
 “ London the 7th day of June in the year of our  
 “ Lord 1816, between Thomas Starling Benson,  
 “ Esq. of the city of London, part owner of the  
 “ good ship or vessel called the Benson, of 573  
 “ tons admeasurement, or thereabouts, now lying  
 “ in the port of London, of the one part, and  
 “ George Betham, of the city of London, merchant  
 “ and mariner, freighter of the said ship, of the  
 “ other part: Witnesseth, that the said owner, for  
 “ the considerations hereinafter mentioned, doth  
 “ hereby promise and agree to and with the said  
 “ George Betham, his executors, administrators,  
 “ and assigns, that he the said George Betham  
 “ shall have and he is hereby accordingly ap-  
 “ pointed to the command of the said ship, but

" with such restrictions as hereinafter mentioned,  
 " and subject to the proviso or condition herein-  
 " after contained respecting the appointment of an  
 " agent on board the said ship, on the part of the  
 " said owner; and the said ship being tight,  
 " staunch, and substantial, and every way properly  
 " fitted, victualled, and provided, as is usual for  
 " vessels in merchants' service, and for the voyage  
 " and service hereinafter mentioned, and being  
 " also manned with thirty-five men and boys (the  
 " said commander included), he the said George  
 " Betham shall be at liberty, and he is hereby  
 " allowed and permitted to receive, take, and load  
 " on board the said ship, in the port of London,  
 " all such lawful goods, wares, or merchandizes  
 " as he may think proper to ship (not exceeding  
 " in the whole what the said ship can reasonably  
 " stow and carry over and above her stores, tackle,  
 " apparel, and provisions, and *reserving sufficient*  
 " *room in the said ship for 100 tons of goods, to*  
 " *be laden by or for account of the said owner, as*  
 " hereinafter is mentioned; and the said ship  
 " being so laden, he the said George Betham shall  
 " and will set sail therewith, and proceed to Cal-  
 " cutta in the East Indies, with liberty to touch at  
 " Madeira and Madras in her outward passage),  
 " and being arrived at Calcutta aforesaid, shall and  
 " will unload the said outward cargo, and reload  
 " the said ship with a cargo of East India produce,  
 " and return with the same to the port of Lon-  
 " don, &c." (Then follows an agreement on the  
 part of the owners to keep up the crew to the  
 number of thirty-two, and furnish provisions,  
 water-casks, &c.) " In consideration whereof,  
 " and of every thing above mentioned, the said

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“ George Betham doth hereby promise and agree  
 “ to and with the said Thomas Starling Benson,  
 “ his executors, administrators, and assigns, in  
 “ manner and form following; that is to say,  
 “ that he the said George Betham shall and will  
 “ take upon himself the command of the said  
 “ ship, for and during the said intended voyage,  
 “ and until her return to the port of London, and  
 “ shall and will navigate her to the best and utmost  
 “ of his skill and ability; and also, that he the  
 “ said George Betham, his executors, adminis-  
 “ trators, and assigns, shall and will accept, receive,  
 “ and *take the said ship into his and their service*  
 “ *for and during the term or space of twelve ca-*  
 “ *lendar months certain*, to commence and be  
 “ accounted from the 12th day of the present  
 “ month of June, and for and during such longer  
 “ time or term (if any) as may be necessary to  
 “ complete her said intended voyage, and until her  
 “ return to and final discharge and clearance in  
 “ the port of London as aforesaid: And further,  
 “ that he the said George Betham, his executors  
 “ or administrators, shall and will well and truly  
 “ pay, or cause to be paid, unto the said owner,  
 “ his executors, administrators, or assigns, freight  
 “ for the use or hire of the said ship at and after  
 “ the rate of 25s. per ton, register measurement  
 “ of the said ship, per calendar month, for and  
 “ during the aforesaid term of twelve calendar  
 “ months certain.” (Then follow provisions for  
 the payment of, and security for the freight, as  
 agreed upon for twelve months, and for further  
 freight in case of detention of the ship, &c.)  
 “ And the said George Betham doth hereby espe-  
 “ cially promise and agree, that all and every the

"bills of exchange, which may be taken in pay-  
 "ment of the freight of the said ship's homeward  
 "cargo, shall be made payable to or to the order  
 "of Messrs. Buckles, Bagster, and Buchanan, of  
 "the city of London, merchants, or indorsed over  
 "to them, and delivered to the said owner's agent,  
 "to be by him remitted to the said Buckles,  
 "Bagster, and Buchanan, in London, who, it is  
 "hereby specially agreed by and between the said  
 "parties, are to receive the amount thereof as  
 "joint trustees for the said owner and the said  
 "George Betham; he the said George Betham  
 "hereby authorizing and empowering them to  
 "appropriate the proceeds of such bills of ex-  
 "change in or towards payment to the said owner,  
 "his executors, administrators, or assigns, of the  
 "balance of freight which may be or become due  
 "to him or them under and by virtue of these  
 "presents, and the residue, if any, to the said  
 "George Betham, his executors or administrators."  
 (Then follows an agreement by Betham, to furnish  
 or pay for provisions and water for the use of the  
 passengers, and to pay for the construction of  
 temporary accommodations for them, and to defray  
 port charges and pilotage, except, &c.) "And  
 "the said George Betham doth hereby further  
 "agree, that the said owner shall have the liberty  
 "of shipping on board the said ship, outward  
 "bound, freight free, any quantity of iron, vinegar,  
 "and mustard he may think fit, not exceeding in  
 "the whole 100 tons, to be delivered at Calcutta:  
 "Provided always, and it is hereby expressly  
 "agreed and understood by and between the said  
 "parties to these presents, and particularly by the  
 "said George Betham, that an agent be put on

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“ board the said ship by the said owner for and  
 “ during the whole of her aforesaid voyage and  
 “ service, and who is to have a separate cabin in  
 “ the said ship, at least six feet square, for his sole  
 “ use, and to mess at the said George Betham’s  
 “ table, which agent is to have the sole manage-  
 “ ment, direction, and superintendence of the said  
 “ ship’s stores and provisions. and the issuing and  
 “ delivering out of the same, for and during the  
 “ said intended voyage; and such agent is likewise  
 “ to have the sole ordering and purchasing of any  
 “ supplies, stores, provisions, and other articles,  
 “ which may be required for the use of the said  
 “ ship during her said voyage; and that all bills  
 “ which may be required to be drawn upon the  
 “ owners of the said ship, for any such supplies,  
 “ or otherwise on account of the said ship, shall  
 “ be drawn by the said agent only: And the said  
 “ George Betham doth hereby expressly engage,  
 “ that he will not, at any time or times during the  
 “ said voyage, or during the time he may be in  
 “ command of the said ship, interfere with or issue  
 “ any stores, provisions, or other articles on board  
 “ the said ship, or purchase any provisions, stores,  
 “ or other articles for the use of the said ship  
 “ (except only such as may be requisite for the  
 “ passengers, and for the said freighter’s servants,  
 “ and for which he will pay out of his own proper  
 “ money): And likewise, that he the said George  
 “ Betham shall not nor will, at any time or times,  
 “ draw any bill or bills upon the owners of the  
 “ said ship, any or either of them, for any pro-  
 “ visions or other articles supplied to the said ship,  
 “ or for any other purpose whatsoever: Provided  
 “ also, and it is hereby further agreed by and

" between the said parties, and especially by the  
 " said owner, that the said freighter shall have the  
 " liberty and privilege of employing the said ship  
 " in the East Indies, for any intermediate voyage  
 " or voyages he may think fit, without prejudice to  
 " this charterparty, but not exceeding in the whole  
 " the time or term of twelve calendar months, to  
 " be computed from and after the expiration of  
 " thirty days next after the arrival of the said ship  
 " at Calcutta aforesaid, upon his the said George  
 " Betham, his executors or administrators, paying  
 " or causing to be paid to the said owner, his  
 " executors, administrators, or assigns, the same  
 " rate of freight as is before stipulated, *viz.* 25s.  
 " per ton per month for all such additional time  
 " as the said ship may be employed or detained in  
 " India ; such additional freight being paid to the  
 " said owner's agent for the time being, or secured  
 " to his satisfaction, previous to the said ship  
 " entering or proceeding on such additional voyage  
 " or service : And it is hereby expressly provided  
 " and declared, that in case the said George  
 " Betham shall proceed with the said ship to any  
 " port or place other than Madeira, Madras, and  
 " Calcutta aforesaid, without the special leave in  
 " writing of the agent of the said owner for the  
 " time being, or if the said George Betham shall  
 " be guilty of a breach of any or either of the  
 " promises and agreements herein contained on  
 " his part, then and in any such case the said  
 " George Betham shall be and become divested of  
 " any further command of or in the said ship, and  
 " it shall thereupon be lawful for the said owner's  
 " agent for the time being to appoint another com-  
 " mander for the said ship, in lieu and stead of

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" the said George Betham : And it is hereby  
 " further expressly provided and declared, that in  
 " case the said ship shall be kept or detained at  
 " Calcutta beyond the ninety days hereinbefore  
 " mentioned, and if, in that event, the said George  
 " Betham shall make default in payment of any or  
 " either of the sums of 1000*l.* hereinbefore en-  
 " gaged to be paid at that place to the agent of  
 " the said owner, in part discharge of the balance  
 " of the freight to become due under and by virtue  
 " of this charterparty, it shall thereupon be lawful  
 " for the said owner's agent to load the said ship  
 " with a cargo for England, on the said owner's  
 " account, without prejudice, however, to this  
 " charterparty, or to any claim which the said  
 " owner, his executors or administrators, may have  
 " against the said George Betham, his executors  
 " or administrators, for freight, dead freight, or  
 " otherwise on account thereof: And, lastly, the  
 " said George Betham doth hereby promise and  
 " engage not to carry too great a press of sail on  
 " the said ship during her navigation, so as to  
 " endanger her safety, and shall not nor will put  
 " into any port or place, other than such as are  
 " allowed or permitted by this charterparty,  
 " unless compelled by stress of weather, want of  
 " repairs, provisions, or other unavoidable casualty:  
 " Provided always, and it is hereby mutually agreed  
 " and understood by and between the said parties  
 " to these presents, that if the said ship shall,  
 " during her said intended voyage or service, meet  
 " with any accident, so as to render it absolutely  
 " necessary for the commander to put into port to  
 " repair, and that the said ship shall be actually  
 " detained more than ten days for that purpose,

" then and in such case the monthly freight or  
 " hire hereby made payable, shall cease and be  
 " discontinued, from and after the expiration of  
 " such ten days, and not commence again until the  
 " day the said ship shall be refitted and ready  
 " again to set sail and proceed on her intended  
 " voyage, wind and weather permitting: And to  
 " the true performance of all and every the pro-  
 " mises and agreements herein contained on the  
 " part and behalf of the said parties respectively,  
 " they bind themselves, their heirs, executors, and  
 " administrators, each unto the other of them,  
 " especially the said owner, the said ship or vessel,  
 " her freight and appurtenances, and the said  
 " freighter, the goods to be laden in her, in the sum  
 " of 15,000*l.* of lawful money current in Great  
 " Britain, firmly by these presents. In witness  
 " whereof they have hereunto set their hands, the  
 " day and year first above written. Thomas  
 " Starling Benson, George Betham. Witness,  
 " D. S. Merceron."

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That the said charterparty was made and ex-  
 ecuted *bonâ fide*; and that on the 25th day of  
 July, 1816, the following memorandum was signed  
 and agreed to by the said Defendant, Thomas  
 Starling Benson, and the said George Betham: —  
 " Conditions agreed between Thomas Starling  
 " Benson, Esq. owner, and George Betham, Esq.  
 " commander, of the ship Benson, on a voyage to  
 " India. Wages 10*l.*, say 10*l.* per month; no  
 " primary or privilege of tonnage whatever. Cabin  
 " allowance for voyage (it being understood that  
 " the agent, chief and second mates, and surgeon,  
 " if any, mess in cabin), 150*l.*, one hundred and  
 " fifty pounds, owner providing nothing. Allow-

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“ance while in India, three sicca rupees per day.  
 “London, 25th July, 1816, Thomas Starling Benson.  
 “son. George Betham. Witness, J. W. Buckle.”

That one Samuel Oviatt went as agent on board the said ship Benson, under the said charterparty, on the said voyage, and carried out letters of introduction from the said persons using the said firm of Buckles, Bagster, and Buchanan, being merchants in London, on behalf of the said Defendants, and James Capper, to the said Plaintiffs, and Alexander Colvin deceased, by which he was directed to apply to them in case of necessity, and he did apply to them, and they acted as agents at Calcutta, both for the said Defendants, and James Capper deceased, and the said George Betham, as hereinafter mentioned. And that the said Samuel Oviatt acted under a power of attorney, executed by the said Defendant, Thomas Starling Benson, (which is fully set out in the special verdict,) by which the said Thomas Starling Benson did nominate, constitute, and appoint the said Samuel Oviatt to be the true and lawful agent and attorney of him the said Thomas Starling Benson, for him, and in his name, place, and stead, to go on board the said ship Benson, and there to remain for and during the whole of the said intended voyage, and until the return of the said ship to the port of London, &c.; and, generally, for him the said Thomas Starling Benson to do or cause to be done all and every such further and other lawful acts, deeds, matters, and things whatsoever, as should be requisite and necessary to be done and performed in execution of the aforesaid charterparty, and in relation to the said ship and her freight.

That the said Samuel Oviatt carried out with

him the said charterparty, and communicated it to the said Plaintiffs, and Alexander Colvin deceased, as soon as he arrived in Calcutta, and before the shipping of the said goods; and the said Plaintiffs, and Alexander Colvin deceased, before that time read the said charterparty, and received a copy thereof, and that for the freight of the said quantity of sugar and indigo, in the said bill of lading mentioned, the said Plaintiffs, and Alexander Colvin deceased, drew bills upon certain other persons, payable sixty days after the said ship Benson's arrival in London, to the order of the said persons using the firm of Buckles, Bagster, and Buchanan, which bills they delivered to the said Samuel Oviatt, to be remitted to the said last-mentioned persons, pursuant to the stipulations in the said charterparty, and the said bills were so remitted. And that the said George Betham employed the said Plaintiffs, and Alexander Colvin deceased, as his agents at Calcutta, who accordingly acted as his agents, and collected and paid over to him the freight of the goods carried in the said ship in the said voyage from London to Calcutta, and procured freight for him on the said voyage from Calcutta to London, and they had a commission from him for procuring such freight.

That the said ship sailed on her said voyage from the river Hooghly to London, with the said quantity of sugar and indigo on board; but that the quantities of sugar and indigo never were delivered to the said Plaintiffs, and Alexander Colvin deceased, or their assigns, pursuant to the said bill of lading (although no act of God, the king's enemies, fire, or any other dangers or accidents of the seas, rivers, or navigation, of what nature or

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kind soever, prevented the same from being so delivered); but on the contrary thereof, 1651 bags of the said sugar, and 12 chests of the said indigo, were wholly lost to the said Plaintiffs, and Alexander Colvin deceased, and the residue of the said sugar and indigo greatly lessened in value; but whether, &c. (concluding in the usual form). And as to the residue of the premises in the declaration mentioned, the jurors were, by the consent of the said Plaintiffs and Defendants, by the said Chief Justice, discharged from giving any verdict thereupon.

On the above special verdict, the Court of King's Bench gave judgment \* for the Plaintiffs, in Easter term, 9 Geo. 4. A writ of error was afterwards brought by the Defendants in the court of Exchequer Chamber, where the following special errors were assigned: — That by the record aforesaid, and the facts found by the jurors aforesaid, it appeared that there was no privity whatsoever between the said Plaintiffs and the said Defendants, touching the said goods and merchandizes in the said first count of the said declaration mentioned; and that there was no promise or duty on the part of the said Defendants, to take care of and carry and convey the said goods and merchandizes, in manner and form in the said first count mentioned; and that there was no consideration, moving to the said Defendants from the said Plaintiffs, to raise any such promise or duty; and that the said George Betham was the charterer of the said ship or vessel, and the person liable to the said Plaintiffs for the said goods and merchandizes; and that the

\* Reported 8 Barn. & Cress. 166.; and 2 Manning & Ryland, 47.

said goods and merchandizes were delivered by the said Plaintiffs to the said George Betham, to be carried and conveyed in the said ship or vessel as aforesaid, and not to the said Defendants; and that the allegations of the said first count of the said declaration were not proved or supported by the facts found by the jurors aforesaid in their said verdict.

The Defendants having joined in error, the judgment of the Court of King's Bench was reversed \* by the Court of Exchequer Chamber, in Michaelmas term.

On this judgment of reversal, the Plaintiffs brought their writ of error in Parliament.

For the Plaintiffs in error, Mr. Serjeant *Taddy*.

The custom of merchants raises a privity of contract between the parties. The owner of the vessel is entitled to freight, which is the consideration for the carriage of goods. It does not follow, because the Plaintiffs could maintain an action against the Defendants in error for the loss of the goods, that therefore the Defendants may maintain an action against the Plaintiffs for the freight. Roccus† says, “*Contrahentes cum magistro navis habent electionem agendi vel contra magistrum vel contra dominum navis, in solidum et solutione unius liberatur alter.*” Again, “*Dominus autem navis nullam habet actionem contra illos qui cum magistro contraxerunt sed contra magistrum per ipsum electum.*” Persons shipping goods in a foreign country are often ignorant who is the owner of a ship, or what private agreements he may have made as to

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\* 7 Bing. 190. 1 Crompton & Jervis, 192. and 1 Tyrwhitt, 55.

† De Navibus et Naulo, p. 27.

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freight. When the ownership is ascertained, the shippers ought to have the remedy against the owner. The owner has his remedy over against the master or agent of his own selection. Duties and rights are not always commensurate and convertible, A person acting as a partner is liable to all persons dealing with the partnership; but he cannot maintain an action against persons so dealing, unless he is proved to be a partner: *Kell v. Nainby*. \*

The owners are liable on the contract of the master, because they receive the freight and possess the vessel.† To divest themselves of this responsibility, they must abandon the right of ownership. So it is, if they have any control over the freight: *Boucher v. Lawson*.‡

In this case the freight bills were first delivered to the agents of the owners. The freight was to be received by trustees, but it was for the benefit of the Defendants. The owners had a special security for, and also a general interest in, the freight: that is enough to ground the liability. The private arrangement between the owners and the captain as to the freight, could not, under such an agreement, exempt the owners from legal responsibility.

According to the law of England, which differs in that respect from the general mercantile law of Europe, when a ship is chartered for a voyage, the charterer becomes *pro tempore* the owner; but in this case, according to the contract, the owners retained, in fact, the benefit of the ownership during the voyage; for they stipulated

\* 10 B. & C. 20.

† *Boson v. Sandford*, 3 Lev. 258. 2 Salk. 439.

‡ Ca. Temp. Hardw. 85. 194.

that 100 tons of goods should be carried for their benefit, and held a control over the ship and freight, continuing throughout the voyage. This was not substantially a demise of the ship for the voyage; and if so, the owner, retaining partly his privileges, remains subject to the responsibility of his ownership. An owner not parting with the whole possession of his vessel retains his lien for freight, *Christie v. Lewis*\*, even though there is an actual demise of the vessel.† If the owner is for the time of the demise wholly divested of the ownership, having no agent on board to direct the management of the ship or to receive freight, the liability may be transferred by the demise.

For the Defendants in error, Mr. *J. Campbell* and Mr. *V. Richards*.

The Plaintiffs in this case had notice of the contract between the master and the owners. The crew were appointed by them; and for damage to the ship by third parties an action might have been brought in their name. But the master hired the ship for the voyage, and was entitled to the freight; he, therefore, was liable to the shippers of goods, and not the owners.‡ This, in substance, is an action upon the contract. The form of action, whether in *tort* or *assumpsit*, on a promise or a duty, is immaterial; for the duty arises out of the contract: *Marzetti v. Williams*.§ If the Plaintiffs had declared, that in consideration of receiving freight the Defendants had undertaken the carriage of the goods, it would have raised the question, who were the contracting par-

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\* See Abbot on Shipping, 5th Ed. p. 173. et seq.

† 2 Brod. & Bing. 410. ‡ *Mackenzie v. Rowe*, 2 Camp. 482.

§ 1 B. & Ad. 415.



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ties. The authority before cited shows that the rights and liabilities of the parties are not altered by the form of the pleading, where the action is bottomed in contract.

When a charter-party is made, the freighter becomes the owner for the time stipulated, the ship being given to him for a term, and the permanent owner is relieved from his liability. In this case the Plaintiffs had notice of the contract, and their agreement was with the freighter. They made no contract, express or implied, with the owner. The case is similar to a lease and sub-lease. In *Boucher v. Lawson*, the declaration alleged the duty of the Defendant, but omitted to state properly the custom of the realm: it was therefore defective. Where a charter-party exists, the ownership is transferred. *Parish v. Crawford*\* is overruled by *James v. Jones*† and *Mackenzie v. Rowe*.‡ The profit or loss of the voyage belonged to Betham: the owners had a lien as against him only to recover the freight.

The word "demise" is not in the charter-party, and is not absolutely necessary even in a demise of lands. An agreement that another shall have the profits for a term is equivalent to a demise. A deviation by the master, with the knowledge of the owner, is barratry against a person who has hired the ship for a time: *Valleio v. Wheeler*.§ He is therefore considered the owner for the particular voyage. The agreement was to pay the consideration

\* 2 Stra. 1251.; but more fully reported in Abbot on Shipping, 5th Ed. pp. 19, 20.

† Cowper, 143.

‡ 3 Esp. 27.; and more fully, Abbot on Shipping, pp. 20, 21.

§ 2 Campbell, 482.

for the hire, notwithstanding the loss of the ship. For this reason the freight bills were only to be considered as securities. If they exceeded the balance due for the hire, the freighter was entitled to the surplus. The agent for the owner had no power to affect the contract of the freighter, nor his right under it. If he had been removed from the command, he would still have remained freighter, liable to pay for the hire of the vessel, and to demand freight from the shippers. The supposed analogy of reputed partnership is fallacious; for if the fact is known to both parties, the right of action is reciprocal.

In reply.

The Defendants might maintain an action for the freight against the shippers, *Dewell v. Moxon*\*; and if not, still they would be liable as possessors of the ship: *Saville v. Champion*.† The receipt and control over the bills for freight, by the owner's agent, is a proof that they retained possession of the ship and the freight; and for that reason the owners are liable to the shippers. If the facts are in favour of the Plaintiffs, the form of the pleadings is immaterial.

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The case was argued while the judges were attending in the House. It stood over till the 11th July, when the judgment was moved.

*Lord Tenterden.* — This case was argued before several of the judges, and I have had an opportunity of collecting from them their opinions. It did not appear to me to be necessary to put to them any formal question, they being all of opinion that the judgment from which the

\* 1 Tau. 391.

† 2 B. & A. 503.

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writ of error is brought to this House, namely, the judgment of the Court of Exchequer Chamber, should be affirmed. The judges of the Exchequer Chamber reversed the judgment which had been given in the Court of King's Bench. At that time I was in the situation which I now have the honour to fill in that court; and among the learned Judges who were present at the argument in this House, was one of the learned Judges, who, although at that time he happened to be a judge of the Court of Exchequer, I mean my learned brother Baron Bayley, was a judge of the Court of King's Bench at the time when this case was decided there, and he, upon reflection, changed his opinion, and was one of the judges upon whose unanimous opinion I take the liberty to move your Lordships to affirm the judgment of the Court of Exchequer Chamber. Some other of the learned Judges who were present upon the argument of this case before the House, had not been members of either of the courts at the time when the case was argued in those courts respectively; to them the matter was new. Having stated shortly the history of the proceedings in the case, I will, with your Lordships' permission, direct your attention to the point in dispute, what the case really was, and upon what grounds I am about to recommend that the judgment of the court below should be affirmed.

It was the case of an action brought by the Plaintiffs in error against the Defendants, as the owners of a ship called the *Benson*. The action was brought upon a bill of lading of goods shipped at Calcutta, for which a person of the name of Betham, who was then master of the ship, had

signed the bill of lading for the delivery of the goods in London, but the goods were not delivered.

Two propositions of law are clear as applicable to a case like the present. The first is the common case of goods shipped on board a vessel of which the shipment is acknowledged by a bill of lading signed by the master, that if the goods are not delivered, the shipper has a right to maintain an action against the owner of the ship. The other proposition, which is equally clear, is this, that if the person in whom the absolute property of the ship is vested chartered that ship to another for a particular voyage, although the absolute owner appoints the master and crew, and finds provisions and every thing else, and is to receive from the charterer of the ship a certain sum of money for the use and hire of the ship, an action can be brought only against the person to whom the absolute owner has chartered the ship, and who is considered the owner *pro tempore*, that is, during the voyage for which the ship is chartered. In such a case, an action cannot be maintained against the person who has let out the ship on charter, namely, the absolute owner.

Those two propositions being clear, the question is, whether the instrument to which I am about to direct your Lordships' attention is to be considered as a charter of the ship to Betham, who went out as master, or whether the true legal effect of the instrument is only this, that the owners of the ship, the Defendants, consented to allow Betham to go out as master of the ship, and to receive from him a certain sum, and to allow him to take all the profits. A contract of that kind certainly can be made between the owners of the

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ship and the master, but it would be open, if there were nothing more in the case, to very great objection, because it would afford an opportunity to the owners of the vessel, in a great many cases, to relieve themselves from the responsibility which attaches upon their character as owners, and leave the shipper of the goods to his remedy against the master alone, who, in many cases, is a person by no means sufficient to answer the demand which might be made upon him in case of loss or injury done.

The instrument in question is one of a very peculiar character. I will direct your attention to such parts of it as appear to be material. It is a contract made between the owners of the ship, the persons whom I have mentioned, and Mr. Betham, and it begins by alleging that the owners of the ship agree to appoint, and do by this instrument appoint, him the commander of the ship, subject to the condition therein mentioned, which is, that in case of his misconduct in the character of master, the person whom they by the contract stipulated that they shall have a right to send out to represent them, shall have the power of dismissing him from the command.

If this instrument had contained nothing more, the case would have fallen within the proposition of the kind which I have first mentioned; but it goes on to provide, that Mr. Betham, the master, shall be allowed and permitted to take on board the ship all such goods as he may think proper, and proceed therewith to Calcutta in the East Indies, there to unload and reload the ship, and to return then to the port of London; and upon her arrival there, and final discharge

of her cargo, the intended voyage and service was to end. The owner further agrees, that the ship shall be, before her departure, furnished with proper water-casks and provisions, and every thing of that kind; and he agrees, also, to provide the ship with coals and wood for cooking and dressing the passengers' provisions, for which the freighter is to pay the owner. The person who is in the first instance called the master of the ship, is in the clause making these provisions called the freighter; the term freighter applying to a person who takes the ship under a charter. The owner further agrees, that Betham shall pay the owner freight for the use or hire of the ship, at a certain rate per ton there specified; and it is agreed that such freight shall be paid until the ship's return into the port of London. Then he further agrees, that the bills that may be drawn in Calcutta, in part payment of hire and freight of the goods which may be laid in there, shall be sent over to certain persons in this kingdom, who are to be trustees, and who are to apply the proceeds of those bills towards the payment to the owner of the balance of freight which may be due to him. And the ship being in the first instance intended to go from London to Calcutta, there is another provision, that the freighter shall have the liberty and privilege of employing the ship in the East Indies, for any intermediate voyage he may think fit, paying a certain sum. Then comes the provision to which I have already adverted, namely, that if he misconducts himself as master, the agent for the owner, who is on board the ship, shall appoint another commander, without injury to the rights of the owner upon the charter. The facts are

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found by a special verdict, taken by consent upon the trial of the action; and the charter-party is set forth in the verdict.

Such being the character of the instrument, the special verdict also sets out a memorandum of an agreement which was made between the owner and Mr. Betham: it specifies the sum which he was to receive as wages, having been previously appointed as master. The special verdict then proceeds to state the power of attorney which was given to a person who went as agent on board the ship, upon the particulars of which it does not appear that any thing turns; it is therefore unnecessary for me to draw attention to it. Then the jury found, as a fact, that this instrument was made *bonâ fide*; by which I understand them to mean that the contract was really such as it purported and professed to be: that is, that it was a letting of the ship to the master for the voyage mentioned. And they further found, that the person who went out as agent on behalf of the owner carried with him the charter-party, and communicated it to the Plaintiffs, who were the shippers of the goods. As soon as he arrived at Calcutta, he communicated to them the nature of the charter-party; and they had received a copy of it, so that they knew before the ship arrived the state as to ownership in which the ship had come out, and were acquainted with the contract made between the Defendants, as owners of the ship, and the master.

Upon these facts the Court of King's Bench was of opinion that this instrument was nothing more than a contract between the owners of the ship and the master; the owners agreeing on their part, if he would pay a certain sum to the owners,

that he should have for his own use all the profits over and above that sum upon the freight carried. When the case came before the Court of Exchequer Chamber, it was argued more at length, and more elaborate judgments given, than in the Court of King's Bench; and that Court was of opinion, that this instrument, although it did not contain in terms any words by which the owners let out or chartered the ship to Betham, still it was in legal effect a letting of the ship to him for that voyage; and that he, therefore, was in the situation of the person in the case supposed in the second proposition, which I stated, namely, that he was to all intents and purposes the charterer of the ship, and, consequently, that any contract made with him for shipping goods, may be considered as a contract made with him as the owner *pro tempore* of the ship, and could not be considered as a contract made by the Plaintiffs with the Defendants, against whom the action was brought.

In this opinion of the Court of Exchequer Chamber, and in the reasons given by that Court upon the subject, all the judges who were present in this House upon the argument concurred; and one of the learned persons, who was a judge of the Court of King's Bench at the time when this case was before it, has changed his opinion, and now concurs in the judgment which the Court of Exchequer Chamber has given in this case.

For myself, I should say, I am inclined to think that the judgment of the Court of Exchequer Chamber is right; and I shall have no hesitation on this occasion, and I hope I shall never have any hesitation, in acknowledging any error which I may have committed in the seat of justice, and

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of endeavouring, as far as I can, to correct that error: I purpose, therefore, to advise your Lordships to affirm the judgment of the Court of Exchequer Chamber, and, in effect, to reverse the judgment which I, together with the other judges then sitting in the Court of King's Bench, have given in this case, thinking, as I do, that upon the whole that is the sounder judgment; and knowing that such is the opinion of almost every judge in Westminster Hall.

Judgment affirmed.

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## ENGLAND.

(COURT OF CHANCERY.)

WILLIAM RHODES - - - *Appellant.*RICHARD BENYON DE BEAUVOIR - *Respondent.*

R. having a lease of lands near London, adapted for building, and improving in value, with which advantages he was well acquainted by residence on the spot, employed T., the confidential solicitor of his landlord, to apply for a new lease.

An agreement for a long lease, at a gross undervalue, and upon terms very disadvantageous to the landlord, was obtained by the co-operation of the solicitor, at a time when the landlord, a very old man, was confined to his bed by illness, it being supposed by the solicitor that he was dying.

The agreement, which contained a proviso that T. should be employed in preparing the underleases on the property, was signed on a Saturday. On the following day (Sunday) instructions were sent by the solicitor to a conveyancer to prepare the lease on behalf of the lessee, and many of the covenants usual in such leases were omitted. The lease was prepared and executed on the following Wednesday, the landlord not being duly apprized that his solicitor was thus acting for his tenant.

The proviso in the agreement for the employment of the solicitor in the underleases was not inserted in the lease. But by arrangement between the tenant and the solicitor it was omitted; and as a substitution to secure this advantage, a bond for 10,000*l.* was given to the solicitor by the tenant, who also gave him a gratuity of 100*l.* upon the settlement of his bill.

The landlord died some months after signing the agreement and executing the lease, and a party entitled under his will to a life estate in the premises, with a remainder in fee, subject to intervening contingent uses, accepted rent from the tenant for some time after the death of the deviser, but in ignorance of the facts as to the procurement of the lease. Having discovered the facts, he filed a bill to set aside the lease, on the ground of fraud and imposition; and by decree in chancery the lease was set aside, as unfairly and improperly obtained.

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On appeal, this decree was varied, by directing issues on the following questions : — First, Was the lease granted by Peter Beauvoir to the Defendant, William Rhodes, obtained by fraud and imposition? Secondly, Did Peter Beauvoir know, when he executed the agreement in the pleadings mentioned, that Thomas Tebbutt the elder, therein named, was the Defendant William Rhodes's solicitor, and acting for him in the matter of the said agreement, or of the lease, in the pleadings mentioned, as well as for himself the said Peter Beauvoir? Thirdly, Was the lease bearing date the 17th day of January, 1821, in the pleadings mentioned, granted at an undervalue? Fourthly, Did Peter Beauvoir intend to favour the Defendant, William Rhodes, in respect of the terms on which the lease should be granted? Fifthly, Was the lease granted at an undervalue, supposing Peter Beauvoir intended to favour the Defendant, William Rhodes?

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IN the year 1802, the Reverend Peter Beauvoir, of Downham Hall in the county of Essex, clerk, being seised in fee of an estate called Balmes Farm, situate in the parishes of Hackney and Shoreditch in the county of Middlesex, consisting of a capital messuage or mansion house and 150 acres of land, by indenture, dated the 29th of September, 1802, demised the same to the Appellant, his executors, administrators, and assigns, for a term of twenty-five years, from the date of the deed, at the rent of 54*5*l. per annum; reserving the power of resuming possession of closes of the premises, for the purpose of digging the earth, and to convert the same into tiles and bricks, or to build thereon, allowing the Appellant 3*l.* 11*s.* 0*d.* for every acre out of the rent thereby reserved. And by the same indenture Mr. Beauvoir also granted to the Appellant, his executors, &c., during the twenty-one first years

of the lease, free liberty to dig for the burning and making of bricks fifteen feet from the surface.

The lease also contained all the covenants usually inserted for the protection of the landlord.

On the 20th of July, 1803, an indorsement was made upon the indenture of lease, and signed by the Appellant, whereby the Appellant agreed that he would not, during the term, dig for brick earth any part of the land demised, except 20 acres.

In the year 1818, the Regent's Canal had been commenced in the immediate vicinity of the premises, and was then about to be cut through the estate, by which the value of the property was raised for agricultural purposes, and had also become adapted for building upon, and was capable of being let to advantage on building leases.

In March, 1818, the Appellant applied to Mr. Beauvoir for a renewal of the lease. Mr. Beauvoir returned for answer, that he would, next spring, desire Mr. Ashpitel to survey the estate, and would grant a lease for twenty-one years from Michaelmas 1819, on such terms as might be thought fair and equitable between landlord and tenant.

In November, 1818, the Appellant applied by letter to Mr. Thomas Tebbutt the elder, who was acting as solicitor for Mr. Beauvoir, stating that he was desirous that Mr. Tebbutt should receive instructions to prepare the draft of the new lease, which Mr. Beauvoir had promised to grant.

In consequence of this letter Mr. Ashpitel was directed by Mr. Tebbutt to survey the estate, for the purpose of ascertaining the terms upon which the new lease should be granted. The result of his opinion was, in December, 1818, communicated to Mr. Beauvoir in the following letter:—

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“ Dear Sir :— Mr. Tebbutt having informed me  
 “ that it was your wish I should survey the Balmes  
 “ Farm, with the view to granting an addition to  
 “ Mr. Rhodes’s present lease, I beg to say I have  
 “ done so, but in making my report, I feel I should  
 “ ill return the confidence you have placed in me  
 “ on several occasions, if I did not first advise you  
 “ not to grant any extension until the present lease  
 “ is expired (that is, presuming you have not al-  
 “ ready promised it). The present lease has nine  
 “ years unexpired, at 545*l.* per annum, but as the  
 “ farm is now worth at least 1000*l.* per annum,  
 “ Mr. Rhodes’s application for sixteen years, in  
 “ addition to the present nine (making twenty-five  
 “ years), at little, if any, additional rent, is most  
 “ unreasonable. You no doubt would wish to give  
 “ Mr. Rhodes the preference as an old tenant, but  
 “ I see no reason because Mr. Rhodes, and his  
 “ father before him, have enjoyed your estate for  
 “ many years, at half its value, and have made a  
 “ princely fortune of it, that he should expect to  
 “ secure it for his children upon like terms ; of  
 “ course I consider what I write as in confidence  
 “ between ourselves : I should not wish to offend  
 “ Mr. Rhodes, who has great influence in our pa-  
 “ rish, and might do me an injury ; at any rate I  
 “ think you should not grant more than twelve  
 “ years in addition to the nine, so as to make  
 “ twenty-one years ; it is not customary so near  
 “ London, where the value of land is increasing  
 “ yearly, to grant more than fourteen years. With  
 “ this view, and considering the farm worth 1000*l.*  
 “ per annum, I calculate as follows :

“ If the rent is now raised to 750*l.* per annum,  
 “ that will be a gain of 205*l.* per annum for the first

" nine years, which with compound interest will  
 " amount to 2255*l*.

" Then there will be a loss of 250*l*. per annum  
 " for the remaining twelve years, which with  
 " interest, deducting the interest of the 2255*l*.  
 " gained the first nine years, will amount to  
 " 2208*l*.

" So that you see the rent should be raised to  
 " 750*l*. per annum, as an equivalent for adding  
 " twelve years to the present lease. A clause  
 " should be in the lease to enable you to take away  
 " the front ground, and the ground on the banks  
 " of the canal for building. I have often won-  
 " dered you do not let the land for building: with  
 " proper attention I am sure it would let on build-  
 " ing leases, I think I am within compass, for  
 " 4000*l*. per annum; the front ground would let  
 " with very little trouble. *Mr. Tebbutt being Mr.*  
*Rhodes's attorney* I have not told him the con-  
 " tents of this, not that I think he has your interest  
 " less at heart on that account, but it is natural to  
 " suppose he would wish to oblige Mr. Rhodes.

(Signed) W. H. ASHPITEL."

At the time of writing this letter Mr. Ashpitel was ignorant of the power of resumption reserved in the old lease to Mr. Beauvoir.

On the 23d of December, 1818, Mr. Ashpitel sent to Mr. Rhodes a letter as follows:—

" Sir,—I am directed by Mr. Beauvoir to in-  
 " form you he is willing to grant you an extension  
 " of the lease of the Hoxton Farm upon the fol-  
 " lowing conditions; viz. Lease to be for twenty-  
 " one years, from Michaelmas, 1819; rent 750*l*.  
 " per annum net. The ground in front of the

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“turnpike-road, not exceeding two hundred feet  
 “deep, as also any part of the land upon the banks  
 “of the intended canal, to be given up for build-  
 “ing or wharfs on six months’ notice. Tenant to  
 “pay tithes, but to have the benefit of the agree-  
 “ment between Mr. Beauvoir and Mr. Tyssen,  
 “relative to the great tithes.”

The Appellant returned no answer to this letter,  
 and took no notice of the communication; but in  
 January, 1819, he addressed the following letter to  
 Mr. Beauvoir:—

“Hoxton, 27th January, 1819.

“Rev. Sir,—Since I had the pleasure of seeing  
 “you, I thought it would be most pleasant to you  
 “my stating in writing my opinion respecting the  
 “new lease; that is, to ask of you the favour to  
 “grant me one for twenty-five years, from 29th  
 “September next. The present rent being 545*l.*  
 “per annum, I hope you will make no increase in  
 “that for nine years, being the term the old ex-  
 “pires; then for the remainder of the twenty-five  
 “years there will be sixteen years, at such rent as  
 “you think proper for me to pay; as I know you  
 “will have the goodness to consider a tenancy of  
 “sixty years, and upwards of 50,000*l.* having been  
 “paid for rent and brick-earth by my father and  
 “myself.”

Mr. Beauvoir returned no answer to this letter;  
 and no further steps were taken on either side  
 until the latter end of 1820.

About the time of making the above valuation,  
 Mr. Ashpitel informed Mr. Thomas Tebbutt the  
 elder of the valuation which he had made, when  
 Mr. Tebbutt observed, he thought that part of the  
 valuation which referred to the estate as for build-

ing purposes was too high ; but agreed in the opinion that the land was worth 3000*l.* per annum for those purposes.

Mr. Thomas Tebbutt the elder had been for many years Mr. Beauvoir's solicitor, and agent for his property in and near London ; he resided near Balmes Farm, and was acquainted with the nature and value of the property. At the time of these transactions he was in partnership with his two sons Thomas Tebbutt the younger and John Tebbutt, and the firm continued to be employed by Mr. Beauvoir as his solicitors.

In the month of November, 1820, John Tebbutt applied to Mr. Ashpitel to join him in taking part of the premises on a building speculation ; stating as a reason for his wish to embark in it, that it would give him considerable business in his profession of a solicitor, by reason of the number of leases and assignments which he should have to prepare. Mr. Ashpitel accordingly wrote, in November, 1820, the following letter to Mr. Beauvoir :—

“ Rev. Sir,—The Regent's Canal through your  
 “ estate at Hoxton being completed, I think part  
 “ of the ground might be let to advantage for  
 “ wharfs. Mr. Tebbutt, junior, is desirous of  
 “ taking part or the whole of your land there, on  
 “ a building lease, as he thinks it would bring him  
 “ a good deal of business in his profession, in  
 “ making leases, &c. ; and he has proposed to me  
 “ to join him in the undertaking, as surveyor.  
 “ Having eight young children, of course it is my  
 “ duty to do all in my power to provide for them ;  
 “ and, therefore, should you have no objection, I  
 “ should be glad to take part with him at a fair  
 “ reasonable rent ; I can get good security for my

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“part, and Mr. Tebbutt, senior, will be security  
 “for his son, so that the rent may be regularly  
 “paid at a banker’s. Should you be pleased to ap-  
 “prove of this, I hope, with proper exertions, we  
 “shall not only benefit ourselves and families, but  
 “greatly increase the value of your estate.”

To this letter Mr. Ashpitel shortly afterwards  
 received the following reply:—

“Downham Hall, December 8th, 1820.

“Sir, — As you say that the letting of some of  
 “my lands, at Hoxton, on a building lease, will  
 “not only be of benefit to yourself, but also to Mr.  
 “Tebbutt, junior, and also greatly increase the  
 “value of my estate, I cannot have any objection  
 “to acceding to the proposal made in your letter  
 “of the 30th of November last.

(Signed) PETER BEAUVOIR.”

In consequence of Mr. Beauvoir’s favourable  
 reception of their offer, various meetings took place  
 between Mr. John Tebbutt and Mr. Ashpitel, for  
 the purpose of arranging the terms of the proposal  
 which they should make to Mr. Beauvoir, both as  
 to the quantity and situation of the land, and as  
 to the amount of the rent: Mr. Ashpitel would  
 have taken the land, or a fair proportion of it,  
 at the rate of above 4000*l.* per annum for the  
 whole; and he made out, at the request of John  
 Tebbutt, a valuation in writing, which, exclusive  
 of the house upon the estate and of a piece of land  
 adjoining the house, and another piece adjoining  
 the Regent’s Canal afterwards let for wharfs,  
 amounted to 3765*l.* per annum; and the parts so  
 excluded from the valuation were considered to  
 be worth 700*l.* per annum, which was in fact below  
 the real value.

While this treaty was pending, an arrangement was made between Thomas Tebbutt the elder and the Appellant, by which a new lease was obtained for Mr. Rhodes.

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Before the 16th December, 1820, the Appellant had made to Mr. Tebbutt proposals for taking the land at 1200*l.* a year, and Mr. Tebbutt had advised the Appellant thereon.

On the 16th December, 1820, Mr. Tebbutt wrote the following letter to the Appellant, marked "private" on the back:—

"Dear Sir, — It will be more satisfactory to me, and I think more proper, if you will have the goodness of stating your intended proposals to Mr. Beauvoir, and send them to me sealed up, directed to him, with any letter or observations to him thereon. I would have you increase your offer in a small degree for a building lease for the whole, as well as a part, and to make the increase upon the whole commence at an earlier period; it is also proper that you should write a letter to me enclosing the above, requesting me to go down to Mr. Beauvoir therewith on your behalf, and to state how far I am to treat with him, *if necessary*\*, beyond your proposals, for my guidance and justification."

Another interview took place between Mr. Tebbutt and the Appellant on the 20th December, 1820; on which occasion the two following letters were delivered by the Appellant to Mr. Tebbutt:—

"Hoxton, 19th December, 1820.

"Sir, — You having informed me Mr. Beauvoir acquainted you he was desirous of improving his

\* These words are underlined in the original letter.

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“ rental from this farm by letting it to build upon,  
 “ I shall esteem it a favour your seeing him on the  
 “ business, as my present lease has only seven years  
 “ to come; it is quite necessary for me to know  
 “ what I am to expect, as it must take me two or  
 “ three years to look out for another home, should  
 “ I be compelled to leave this farm I have so many  
 “ years held under Mr. Beauvoir, and my father  
 “ before me; and I do confess, that having been  
 “ born here and known no other home, my father  
 “ having met with more success than is the lot of  
 “ most men, myself having also been blessed with  
 “ success, you must expect I am attached to the  
 “ old spot, and I could not fancy another home;  
 “ and, indeed, sooner than be turned out, I would  
 “ pay more than the estate was worth to another  
 “ person. I am sure Mr. Beauvoir will easily per-  
 “ ceive that there must be every allowance made  
 “ for my anxiety on this subject; and I trust he  
 “ will put such terms upon his property that will  
 “ enable me to believe he has my welfare and com-  
 “ fort in view, together with his own interest. I  
 “ beg you will present my best respects to my  
 “ landlord, sincerely wishing he may continue in  
 “ good health, and hoping that I may have the  
 “ pleasure of being his tenant for many years to  
 “ come.

“ WILLIAM RHODES.

“ To Thomas Tebbutt, Esq.”

“ Hoxton, 19th December, 1820.

“ Rev. Sir, — Being informed you have ex-  
 “ pressed a desire to let your estate here on a  
 “ building lease, I beg leave to propose the follow-  
 “ ing terms for taking your lands upon a ninety-

“ nine years’ lease : — The present rent 545*l.* to  
 “ continue until Christmas, 1822 ; to pay for the  
 “ next five years 750*l.* per annum ; and for the  
 “ remainder 1200*l.* per annum ; or if you think  
 “ proper only to let the land along the road side,  
 “ one hundred and fifty feet in depth, that will  
 “ contain upwards of fifteen acres, and to pay you  
 “ at the rate of 20*l.* per acre, with having a cus-  
 “ tomary allowance of ground rent before it com-  
 “ mences.

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“ WILLIAM RHODES.

“ To the Rev. Peter Beauvoir.”

The two last letters were on the 21st of December, 1820, forwarded by Thomas Tebbutt the elder, enclosed in the following letter written by himself to Mr. Beauvoir : —

“ Rev. Sir, — Having heard that an application  
 “ had been made to you to take Mr. Rhodes’s land  
 “ on a building lease, I thought it my duty to in-  
 “ form him of it, in order that he might come for-  
 “ ward, and, if possible, prevent it by making you  
 “ a liberal offer for the same ; in consequence of  
 “ which he has sent me the enclosed letter and pro-  
 “ posal, which I send for your perusal. I do not  
 “ think he offers quite enough ; but as he states he  
 “ will give as much for the land or more than any  
 “ other person, I hope you will give him the pre-  
 “ ference on account of his having been so many  
 “ years your tenant.”

Mr. Beauvoir returned no answer to either of these letters, being at that time too unwell to attend to business ; and it was therefore, after a short delay, agreed between the Appellant and Mr. Tebbutt, that the latter should go down himself to

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Downham Hall, the place of Mr. Beauvoir's residence, and see Mr. Beauvoir upon the subject, and endeavour to prevail upon him to grant a lease to Mr. Rhodes. He accordingly went thither on Saturday the 13th January, 1821, and had an interview with Mr. Beauvoir: upon this occasion the following memorandum, in the handwriting of Mr. Tebbutt, was signed by Mr. Beauvoir:—

“ Mr. Tebbutt has my leave to prepare a fresh  
 “ lease from me to Mr. William Rhodes of the  
 “ farm he now holds of me, called Balmes Farm,  
 “ at Hoxton, Middlesex, upon the following condi-  
 “ tions:— To surrender up his present lease to be  
 “ cancelled; to take a new lease from Lady-day  
 “ next for ninety-nine years, at a rent of 550*l.* a  
 “ year for the first year of the said term; at 600*l.*  
 “ a year for the second year; at 700*l.* a year for  
 “ the third year; at 800*l.* a year for the fourth  
 “ year; at 900*l.* a year for the fifth year of the  
 “ said term; 1000*l.* a year for the sixth year; and  
 “ at 1300*l.* a year for the remainder of the said  
 “ term, clear of all taxes; Mr. Rhodes to pay all  
 “ expenses of said lease; and that all underleases  
 “ of said farm to be granted shall be done by Mr.  
 “ Tebbutt, his executors or administrators, at the  
 “ expence of Mr. Rhodes, and the lease to be for-  
 “ feited if he employs any other person without  
 “ my consent; and if Mr. Rhodes will not take a  
 “ lease upon the aforesaid terms, Mr. Tebbutt may  
 “ agree to my granting such lease at that or a  
 “ greater rent to whom he pleases; or Mr. Rhodes  
 “ may have the front ground at 25*l.* per acre, three  
 “ hundred feet deep, subject to the aforesaid con-  
 “ ditions. — Dated this 13th day of January, 1821.

“ PETER BEAUVOIR.”

On Sunday the 14th of January, 1821, Mr. Tebbutt had an interview with the Appellant, and received instructions for the preparation of the lease, and then, or on the following day, the Appellant signed at the foot of the agreement his acceptance of the terms contained in it.

Mr. Tebbutt, throughout these transactions, acted as the solicitor of the Appellant.\*

\* This, and some of the facts above stated, were proved by the following extract from a bill of costs:—

William Rhodes, Esquire,

To Thomas Tebbutt.

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Dec. 11. On hearing privately that certain persons were about to take your farm at Hoxton for building, writing to you thereon 0 6 8

13. Attending you at Clapton upon the subject when you gave me proposals to take the same of Mr. Beauvoir at 1200*l.* a year, and advising you thereon - - - 0 13 4

16. Writing to you to send me your said proposals in writing for my justification, and advising you thereon - 0 6 8

20. Attending you thereon, when you delivered me same in your handwriting, perusing them, and advising thereon - 0 13 4

21. Writing to Mr. Beauvoir thereon and therewith, and paid carriage and portage to him - - - 0 9 2

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Jan. 8. Attending you this day on your wishing me to go down to Mr. Beauvoir and endeavour to prevail on him to grant you a building lease of your farm at Hoxton, conferring with and advising you thereon, when you requested me to go this week at farthest, which I agreed to do - - - 0 13 4

13. Journey to Downham Hall, when I found Mr. Beauvoir was very ill; he stated

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On the 15th of January, 1821, Mr. Tebbutt sent the following letter to the Respondent : —

“ Sir, — Mr. Beauvoir having sent for me upon  
 “ business, I went to him on Saturday last (the 13th  
 “ of January), and am sorry to inform you I found  
 “ him so very ill that I do not think he will live  
 “ many days. As I succeeded Mr. Wall in the  
 “ stewardship of Hackney manor, and solicitor for  
 “ the Tyssen estates, which I now hold through the

		£	s.	d.
	that he had received your proposals, and consented to my preparing a lease of your farm for building, upon terms very advantageous to you and your fa- mily. Out necessarily from home from eight this morning to twelve at night	5	5	0
1821.	Paid post chaise hire and sundry expenses there and back	5	15	6
Jan. 14.	Attending you therewith when you ap- proved of the same, and desired the lease to be made out directly, when I sent to town immediately by your order for that purpose	0	13	4
15.	Attending you again, drawing out a me- morandum at the foot of the proposals that you agreed thereto, and my clerk engrossing and witnessing same on your signing it	0	6	8
16.	Perusing the draft lease with you this morning, and settling the same	2	2	0
	Attending therewith to town to be en- grossed, and paid stage hire	0	15	4
		£	18	0 4

There was no evidence that Mr. Beauvoir knew that Mr. Tebbutt was acting in this matter as solicitor for the Appellant, or had come down at his request, except in so far as a knowledge might be inferred from the communication of the fact by Mr. Ashpitel's letter before stated, p. 199. The form of the

"kindness of Mr. Beauvoir, whose friendship and  
 "goodness I have experienced ever since, and as  
 "I know your father well, and have been Mr.  
 "Beauvoir's solicitor so many years, I think it my  
 "duty to apprise you of his situation, and I beg  
 "your directions how I am to act, humbly hoping  
 "that in the event of your succeeding to his  
 "estates, you will have the goodness of continuing  
 "me solicitor."

Mr. Tebbutt on the same day called on Mrs. Benyon, the mother of the Respondent, for the purpose of informing her of the state of Mr. Beauvoir's health; and he then told her that Mr. Beauvoir was in a very bad state of health, and could live

memorandum giving an authority to Mr. Tebbutt to act for Mr. Beauvoir, and items in the bill of costs made out by Mr. Tebbutt, delivered to the executors of Mr. Beauvoir, seem to furnish a contrary inference.

Richard Benyon de Beauvoir, Esq.,

To Thomas Tebbutt.

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Jan. 13.	Attending the Reverend P. Beauvoir at Downham Hall by his order, relative to a letter he had received from Mr. Rhodes for taking a fresh lease of Hoxton farm, and surrendering up his old one: conferring with Mr. Beauvoir thereon, and at his request drawing up memorandum for letting his farm at Hoxton to Mr. Rhodes on a building lease: reading the same over to him, which he approved of and signed, and another memorandum for renewing Mr. Warburton's lease, which he also approved of.	Out two days	-	-	10	10	0
	Paid chaise hire and expenses there and back		-	-	5	15	6
	Numerous attendances, &c. in respect of the above two leases on executin						

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but a short time, and he thought it his duty to communicate the same to her : he made no mention however to her of the transaction then pending relative to the lease.

On the same 15th of January, 1821 (being Monday), instructions were given to a conveyancer for the immediate preparation of a lease, and extra fees were charged by Mr. Tebbutt to the Appellant, as having been paid to counsel for expedition. The draft lease was prepared and settled by counsel on the same 15th of January ; and on the morning of the day following, the 16th of January, Mr. Tebbutt took the draft lease to the Appellant, and settled the same with him. On the same 16th of January, the draft lease was again revised by counsel, and on that day it was also engrossed.

The fees to counsel to settle the draft lease were charged to the Appellant : no charge was made in Mr. Beauvoir's account ; and it appears that counsel was instructed to settle the draft lease on behalf of the Appellant. There was no evidence to shew that he was instructed to settle it on behalf of Mr. Beauvoir also, nor was the draft submitted to any other professional person on Mr. Beauvoir's behalf.

On the 17th of January the engrossment of the lease was taken down by Thomas Tebbutt the younger to Downham Hall, together with a letter from his father to Mr. Beauvoir, from which the following extract is made : —

“ Yourself to Rhodes.

“ Rev. Sir, — I send you herewith the draft of  
 “ this lease for your perusal, which is made con-  
 “ formable to the instructions I took from you on  
 “ Saturday last ; and if you have leisure to peruse

“ the same, and you approve thereof, my eldest son  
 “ has got the engrossment with him for you to sign,  
 “ so that you need not be troubled further on this  
 “ business, &c.

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“ THOMAS TEBBUTT.”

The lease was then executed by Mr. Beauvoir. No plan of the estate was drawn upon or annexed to the lease, nor any counterpart of it then executed by the Appellant.

By this lease, which is an indenture made between Peter Beauvoir of the one part, and the Appellant of the other part, it was witnessed:—  
 “ That for and in consideration of the rents, cove-  
 “ nants, and agreements thereafter reserved and  
 “ contained on the part of the said William Rhodes,  
 “ his executors, administrators, and assigns, to be  
 “ paid and performed, he the said Peter Beauvoir  
 “ did grant, demise, and lease unto the said  
 “ William Rhodes, his executors, administrators,  
 “ and assigns, all that messuage or dwelling-house,  
 “ with the large yard thereunto adjoining, situate,  
 “ lying, and being in the parish of Saint John, at  
 “ Hackney, in the county of Middlesex, now in  
 “ the tenure or occupation of the said William  
 “ Rhodes, his assigns or undertenants; and also  
 “ all those several pieces or parcels of land or  
 “ ground also in the tenure or occupation of the  
 “ said William Rhodes, his undertenants or assigns,  
 “ situate and being at the parish of Saint John,  
 “ at Hackney aforesaid, and containing by esti-  
 “ mation one hundred and forty-one acres or  
 “ thereabouts; which said messuage or dwelling-  
 “ house, and pieces or parcels of ground, were  
 “ part of a farm commonly called or known by

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“ the name of Balmes Farm ; and also all those  
 “ other pieces or parcels of ground situate near  
 “ and adjoining to the aforesaid pieces or par-  
 “ cels of ground, and being in the parish of Saint  
 “ Leonard, Shoreditch, in the county of Middle-  
 “ sex, also in the tenure or occupation of the said  
 “ William Rhodes, his undertenants or assigns,  
 “ containing by estimation eight acres or there-  
 “ abouts ; and which said messuage, pieces or  
 “ parcels of ground therein before described, were  
 “ or were intended to be more particularly de-  
 “ lineated and described in the plan or ground  
 “ plot drawn or intended to be drawn on the back  
 “ of the second skin of the said indenture ; and  
 “ all and singular the messuages or tenements,  
 “ erections and buildings, erected and built, and  
 “ all and every the messuages or tenements, erec-  
 “ tions and buildings, which should at any time or  
 “ times thereafter during the continuance of that  
 “ demise be erected and built on the said pieces  
 “ or parcels of ground thereby demised or intended  
 “ so to be, or any part thereof, with full power  
 “ and liberty to erect any messuages or tene-  
 “ ments, erections or buildings, on the said pieces  
 “ or parcels of land and premises therein-before  
 “ demised or expressed and intended so to be, or  
 “ any of them, or any part thereof, except such  
 “ right of way and right of entry as therein men-  
 “ tioned ; to hold the same free from the land-tax,  
 “ which had been redeemed, unto the said William  
 “ Rhodes, his executors, administrators, and as-  
 “ signs, for the term of ninety-nine years and one  
 “ quarter of another year, to be computed from  
 “ the 25th day of December, 1820, at the fol-  
 “ lowing rents ; viz. For the first quarter of a

" year 136*l*. 5*s.*; for the first year then next fol-  
 " lowing 550*l*.; for the next or second year of the  
 " said term 600*l*.; for the next or the third year  
 " 700*l*.; for the fourth year 800*l*.; for the fifth  
 " year 900*l*.; for the sixth year 1000*l*.; and for  
 " each subsequent year 1300*l*., payable quarterly.  
 " And the said Peter Beauvoir thereby covenanted  
 " that for the purpose of encouraging building  
 " on the said land and premises thereinbefore  
 " demised or expressed and intended so to be,  
 " he the said Peter Beauvoir, his heirs and as-  
 " signs, should and would when and so often  
 " as the said William Rhodes, his executors, ad-  
 " ministrators, or assigns, should grant or agree to  
 " grant any underlease or underleases of any piece  
 " or parcel or pieces or parcels of ground for the  
 " purpose of building thereon, or of any messuage  
 " or tenement, messuages or tenements, erected on  
 " the said premises, or any part thereof, for all or  
 " any part of said term of ninety-nine years and  
 " one quarter of another year thereby granted,  
 " agree to apportion the rents therein-before re-  
 " served, so as not to demand or receive a greater  
 " part of the same rents from and out of the  
 " ground to be comprised in every such underlease  
 " respectively, and the messuage or tenement, mes-  
 " suages or tenements, to be erected thereon, or  
 " from and out of the messuage or messuages to  
 " be comprised in such lease respectively, as the  
 " case might be, than such part of the said rents as  
 " in the judgment of the solicitor, agent, steward,  
 " or surveyor of the said Peter Beauvoir, his heirs  
 " or assigns, should be a fair and proportionate  
 " part thereof, comparing the value of the ground  
 " comprised in such underleases respectively with

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“ the value of the rest of the said demised premises; and should and would in every such case, at the request in writing and at the proper costs and charges of him the said William Rhodes, his executors, administrators, and assigns, make, do, and execute, or join or concur in making, doing, and executing, all and every such acts, deeds, matters, and things respectively, as should be requisite and necessary for effectuating such apportionment or apportionments respectively as aforesaid.”

No schedule of fixtures was annexed to this lease.

The Appellant some time afterwards addressed the following letter to Mr. Beauvoir : —

“ Hoxton, 8th March, 1821.

“ Rev. Sir, — I have frequently taken the liberty of troubling you respecting the renewal of the lease I had the honour to hold under you as tenant; I now have considerable pleasure in offering you my best thanks for your kindness in meeting my wishes, and granting me a new building lease of your property here, in preference to other applications that were made to you, and by strangers, and upon terms *far less than you had been offered by them*; and I am sure, when you consented to my having this lease, it was your opinion and intention that it should eventually prove a beneficial lease to me. I am extremely thankful to you for your kind intentions now, and upon all former occasions; and if it should please God to spare my life for some years to come, and the country should recover from its present state of depression, I shall be enabled considerably to improve your estate, and it may

“turn out at some distant period of advantage to my children; which, if it should, it shall be my endeavour through life to have appropriated to the best purposes of religion and virtue in my family.”

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The clause in the agreement which related to the preparation of underleases was carried into effect by means of a bond executed by the Appellant, and bearing date the 17th of January, 1821; whereby he bound himself, his heirs, executors, and administrators, in the sum of 10,000*l.* to the said Thomas Tebbutt the elder, Thomas Tebbutt the younger, and John Tebbutt, with a condition thereunder written; whereby, after reciting the lease of the same date, and that previously to granting the said lease the said Peter Beauvoir had agreed to grant a similar lease of the same premises to the above-named John Tebbutt, which the said John Tebbutt was desirous of taking for the purpose of preparing the leases and transacting the necessary business of a solicitor therein; and in order to induce him to relinquish the said agreement, the said William Rhodes had agreed to secure to him the said John Tebbutt, and the said Thomas Tebbutt the elder, and the said Thomas Tebbutt the younger, his co-partners, the business of a solicitor in and about the preparing and making all assignments and underleases and derivative leases of the premises comprised in the said indenture of lease, or any part thereof, and all assignments of the premises comprised in such underleases and derivative leases, and any of them, and every part thereof, for their proper use and benefit, in manner thereafter mentioned: the condition of such bond was declared to be, — That if the said William Rhodes,

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his executors and administrators, should from time to time, and at all times, so long as the said Thomas Tebbutt the elder, Thomas Tebbutt the younger, and John Tebbutt, or any or either of them, or any person or persons of their family, should continue to carry on the business of an attorney and solicitor, then carried on by and under the firm of Tebbutt and Sons, when any assignment or assignments of the said premises comprised in the said indenture of lease, or any of them, or any part thereof, should be agreed upon; or any underlease or underleases, or further derivative lease or leases of the same premises, or any of them, or any part thereof, should be agreed to be granted; or when any assignment or assignments of the premises comprised in such underleases or derivative leases, or any of them, or any part thereof, should be agreed upon, employ, or cause and procure the said Thomas Tebbutt the elder, and Thomas Tebbutt the younger, and John Tebbutt, or such one of them, or such other person or persons of their family as should then carry on business as aforesaid, to be employed in drawing, preparing, and engrossing such assignments, underleases, derivative leases, and assignments, and doing all business relative thereto, then, and in such case, the above written bond or obligation to be void, otherwise to remain in full force and virtue.

The bond underwent alterations before it attained the above form, and the consideration on which it was grounded was differently represented at different times. In the draft\*, as first made, the two younger Tebbutts were the sole obligees, and the condition recited an agreement by Mr. Beau-

\* The rough draft was proved in the cause.

voir to grant them a lease of the land in question, and that their relinquishment of such agreement was the consideration for the bond. A further statement had been originally introduced, representing Mr. Beauvoir as stipulating for the preparation of the underleases by the Tebbutts as his solicitors, as a security to himself and his successors, and consenting to the omission of such a proviso in the lease, upon having the bond executed in lieu of it, but this statement was struck out. The name of Thomas Tebbutt the elder appeared to have been introduced, both into the bond as an obligee and into the recitals as one of Mr. Beauvoir's intended lessees; and the names both of Thomas Tebbutt the elder and of Thomas Tebbutt the younger, as such intended lessees, were struck out of the recitals, and the agreement for a lease was ultimately stated to have been made with John Tebbutt alone; and in this form the bond was finally settled. It appeared \*, that, in fact, no agreement was ever made by Mr. Beauvoir for granting a lease to him, either separately or jointly with his father and brother, or either of them, but that he, John Tebbutt, was induced so to state the fact for the purpose of giving greater validity to the bond.

It did not appear in evidence that this bond was ever known to Mr. Beauvoir, or the effect upon his interest communicated to him: no charges for preparing or settling this bond were introduced into the bill to Mr. Beauvoir either by Thomas Tebbutt or his sons.

One hundred guineas was given by the Appellant to Mr. Tebbutt, senior, above his charges for pro-

\* By an affidavit of John Tebbutt, filed in the cause, *post*, p. 252.

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curing the agreement. Messrs. Tebbutt, junior, also made extra charges on the Appellant, amounting to 120*l.* for making the lease and bond, and a surrender of the old lease.\*

In the September following the granting of the lease Mr. Beauvoir died, leaving the Respondent his heir at law, and having by his will, dated the 27th July, 1800, devised the premises in question, as well as all other his real estate, to Edward Benyon, therein described (who died in the testator's lifetime without issue), for life; with remainders (after divers limitations, which failed,) to the respondent for life; with remainder, &c. in trust to preserve contingent remainders, and subject thereto in trust for the Respondent; with remainder to the first and other sons of the Respondent, successively in tail male; with remainder to the right heirs of the testator. And by his will the testator empowered his several devisees, when or as they should come into possession of his real estate, to grant leases thereof for any term not exceeding twenty-one years, under the restrictions therein contained; and also to grant building leases of the premises in question in the suit; and he appointed the Respondent and Martin Whish executors of his will.

Mr. Beauvoir afterwards during his life made two codicils to his will, but they did not alter or revoke it in any point material to the present question; and the will and codicils were, after his death, proved by the Respondent and Martin Whish in the Prerogative Court of Canterbury.

The Respondent having no son, and being the heir of the testator, became entitled to all Mr.

\* These facts appeared by extracts from the day book of Messrs. Thomas Tebbutt the younger and John Tebbutt.

Beauvoir's real estates for life with remainder to himself in fee, subject only to the trustees' intermediate estate for preserving the contingent remainders to the male issue of the Respondent, and to the possibility of such contingent remainders arising.

At the time when the property devolved upon the Respondent he was ignorant of the circumstances under which the lease had been obtained, and for the first twelve months after Mr. Beauvoir's death he accepted rent from the Appellant, and treated him as his tenant; but in the beginning of 1823 he gave notice to the Appellant that he was investigating the circumstances respecting the lease, and that in the mean time the Appellant had better pay no more rent to his bankers.

On the 9th of May, 1823, the Respondent and Martin Whish, as his co-trustee, filed their original bill in the High Court of Chancery against the Appellant and Thomas Tebbutt the elder, thereby stating the facts so far as they had come to the Respondent's knowledge, and praying that the lease executed by Peter Beauvoir might be set aside, as having been obtained by fraud and imposition, and that the Appellant might be decreed to deliver the same up to be cancelled, the complainants thereby offering to deliver up the counterpart thereof, and the Respondent also offering to grant a new lease to the Appellant for such term as would be still subsisting in his old lease if the same had not been surrendered, upon the same terms as were contained in such old lease, and to allow to the Appellant in account the surplus rent which had been paid by him under the new lease beyond the rent which was reserved by the old lease, &c.

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To this bill the Defendants put in their several answers in September, 1823. The Appellant by his answer, among other things, stated that about September, 1820, he was told by Tebbutt, senior, of applications made by other persons for a lease of the estate, and that Tebbutt advised him to make an early application for a building lease, and offered to be the bearer of such proposal; that Mr. Beauvoir was perfectly aware that the lands in question might be advantageously employed in building; but that for the purpose of benefiting persons with whom he had been long connected he was desirous that the Appellant should take such lands upon a building lease, having first offered them to the elder Tebbutt and to his son John Tebbutt. The answer further stated, that after the lease had been granted, Mr. Beauvoir said he had granted a lease to the Appellant upon very advantageous terms, and that his relations could not complain of finding his property underlet: the Appellant also stated, upon the information of the elder Tebbutt, that Mr. Beauvoir, not long before he died, said the Appellant was right in applying for a new lease, as he, Mr. Beauvoir, was very old, and his successor might not be so merciful; and that he, the Appellant, was so far from wishing to conceal from Mr. Beauvoir that he considered the lease beneficial, that upon the execution thereof he wrote to him a letter representing it in that light, and thanking him for his kindness in granting him a lease at less rent than had been offered by others — being the letter of the 8th of March, 1821, above stated. By another part of the answer the Appellant denied that the lease had been obtained upon grossly low terms, and stated that the speculation was attended

with so much hazard that no two persons could have agreed as to the value of the land, nor could any one else have engaged in the speculation with so much chance of success as himself; and that but for his long connection with the estate he could not have given such rent for it. It was further stated, that upon John Tebbutt's refusing the offered lease\*, Mr. Beauvoir observed that it would secure to him the profits of preparing the underleases and assignments; but that he afterwards observed such benefit might be secured to Messrs. Tebbutts by Mr. Beauvoir stipulating that the lessee should employ them: that the object of the agreement respecting the preparation of the underleases and assignments was not only to give a benefit to Mr. Tebbutt and his sons, but also to secure to Peter Beauvoir, or the owners of the reversion of the estate for the time being, the advantage and security of having such underleases prepared by persons in whom they had confidence; and it was represented that the stipulation that the underleases should be prepared by Thomas Tebbutt the elder, as the solicitor of Peter Beauvoir, was made by Peter Beauvoir.

The Appellant farther represented, upon the information of Mr. Tebbutt, that, on Mr. Tebbutt's visit to Downham Hall on the 13th of January, 1821, Mr. Beauvoir fully discussed the Appellant's proposals, and expressed a wish that the Appellant should have the estate, and Mr. Tebbutt the law business to be done thereon; and that he said, "If Mr. Rhodes will give me 1800*l.* a year for the farm, I will grant him a ninety-nine years' lease:"

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\* *Vide ante*, p. 217.

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in consequence of which Mr. Tebbutt drew up the memorandum of the 13th of January, 1821. The answer then stated, that after Mr. Tebbutt had slowly and distinctly read the whole thereof to Mr. Beauvoir, he (Mr. Beauvoir) took the paper into his own hands, put on a pair of spectacles, and read it over to himself; and having so done, walked across the room to the table on which the pens and ink were placed, and subscribed his name thereto.\* He denied that he at any time entered into any agreement with the Defendant Thomas Tebbutt the elder, or arranged with him that he should go down to Peter Beauvoir, and procure an agreement for a building lease on the best terms that he could; but he said that a day or two before the 13th of January, 1821, he, the Appellant, called on Mr. Tebbutt, senior, and asked him to go down to Downham Hall, and learn Mr. Beauvoir's determination; yet he denied that Tebbutt then, or at any other time, undertook to endeavour to obtain an agreement for a lease in the Appellant's favour; or that Thomas Tebbutt the elder was employed by him to go to Downham Hall in order to obtain the agreement, though the Appellant requested him to go there to learn the determination of Peter Beauvoir with respect to the Appellant's proposal. That Thomas Tebbutt the elder and his son went down to Downham Hall on the occasion when the agreement and lease were signed, as the solicitors and agents of Peter Beauvoir, and were considered and understood by him so to act. He admitted the despatch with which the lease was prepared and engrossed, and stated it to have been in pursuance

\* See the depositions of Dale, *post*, p. 243.

of Mr. Beauvoir's directions, and in order that Thomas Tebbutt the younger, who was under the necessity of going down to Mr. Beauvoir on the 17th day of January, might, at the same time, be the bearer of the lease. He stated upon information that no heir could be found to Mr. Beauvoir, and submitted that the inheritance of the property in question had devolved to the Crown, and that the Attorney-General ought to be a party to the suit; he also submitted that all persons to or with whom the Appellant has made any underleases or agreements for underleases should be made parties. He admitted that the Tebbutts also acted as his solicitors. He admitted having paid Mr. Tebbutt for going to Mr. Beauvoir respecting the lease, but denied having given him any gratuity for his services upon that occasion, except that at the time of paying the elder Tebbutt his bill, he, the Appellant, being under the impression that its amount was remarkably low, and that Mr. Tebbutt had acted in a very disinterested manner, drew a check on his bankers for 105*l.*, and presented it to Mr. Tebbutt, insisting upon his acceptance thereof. He admitted the age of Mr. Beauvoir to have been eighty-four, or thereabouts, at the time of these transactions; and that by reason of his great age he was infirm in body, but denied that he was so in mind, and said that he believed him to have been at the time of the transactions, and for many months afterwards, of vigorous and powerful mind, and quite equal to the management of his affairs. The Appellant further stated his belief that Peter Beauvoir did not consult with the elder Tebbutt as to the value of the property or the terms of the letting, and that Thomas Tebbutt did

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not profess or offer to give to Peter Beauvoir any information or advice as to its value, except as he expressed his opinion by the letter of the 21st of December, 1820. The Appellant also set forth, in a schedule annexed to his answer, a list of all underleases and agreements for underleases which he had made of the premises, with the rents reserved thereon.

The answer of Mr. Tebbutt, senior, was to the same effect, making the same representations as that of the Appellant; Mr. Tebbutt alleging from his own knowledge those facts which the Appellant stated from Mr. Tebbutt's information. In particular, Mr. Tebbutt said, that a day or two before the 13th of January, 1821, the Appellant called upon him, and asked whether, as no answer had been received from Mr. Beauvoir, he, the Defendant, would have any objection to go down to Downham Hall, and learn what was Mr. Beauvoir's determination; and that to such suggestion the Defendant replied he had no objection to go down and receive Mr. Beauvoir's instructions upon the business: but he expressly denied that he then or at any other time undertook or engaged to endeavour to obtain an agreement for a lease in favour of the Defendant William Rhodes; or that he then, or at any other time, entered into any other engagement to such or the like effect.

In consequence of the facts disclosed by the answers and discoveries made after the filing of the bill, it was amended by order obtained on the 4th of February, 1824. The amended bill set forth the facts as hereinbefore stated. The amendments principally consisted in making the two younger Tebbutts parties to the suit,—introducing allega-

tions respecting the first application for the lease in 1818 and 1819, — the valuation made by Ashpitel in consequence thereof, and Ashpitel's own application for a lease, — in setting forth the bond at length, and in the insertion of several new charges respecting the illness of Mr. Beauvoir; and particularly introducing the letters written by Mr. Tebbutt, senior, on the 14th of January, 1821, and by Mr. Thomas Tebbutt, on the 18th of the same month, to the Respondent; and also the matter respecting the real value of the property. The bill, as amended, prayed that the lease might be set aside, as having been obtained by fraud and imposition; that the Appellant might be decreed to deliver up the same to be cancelled; and that he might be decreed to account for all the earth and gravel taken by him from the premises beyond the quantity which he was entitled to dig under the old lease, and for the profits made by him by such earth and gravel: the Respondent and Martin Whish thereby offering to deliver up the counterpart of the lease to the Appellant, and the Respondent also offering to grant a new lease to the Appellant for such term as would be still subsisting in his old lease if the same had not been surrendered, upon the same terms as were contained in such old lease, and to allow to the Appellant in account the surplus rent which had been paid by him under the new lease beyond the rent which was reserved by the old lease; and also, so far as the Court should think fit to direct, to confirm all the leases, underleases, and assignments, and agreements for leases, underleases, and assignments made by the Appellant at any time before the bill was filed; and to make all allowances to the Ap-

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Mr. Beauvoir's death, a belief had been impressed upon his (Tebbutt's) mind, from circumstances relative to his state of health, that his death would in all probability take place very suddenly; in which case it was probable that no sensible change would become manifestly apparent with respect to the vigour either of his body or mind until after his decease, and under that impression he said he wrote the letter in question. He stated that Mr. Beauvoir was particularly desirous so to arrange his property as to save himself unnecessary trouble; and with respect to the value of the land, he admitted that he so far assented to the correctness of Mr. Ashpitel's observations above stated, as to express his opinion, that under good management the premises might be so let upon building leases as ultimately to produce a rental of 3000*l.* a year. But he also said, he believed that Mr. Beauvoir (who, as he said, was fully aware of the value of the property,) considered the value of the land to be let in one lot for building purposes, such as might induce a respectable person to offer as much but not more than 1800*l.* a year. He denied having held any communication with Mr. Ashpitel, either verbally or by writing, from the time of Mr. Ashpitel's survey in December, 1818, until September or October, 1820.

John Tebbutt in his answers, and the other Defendants upon his information, represented the proposal of himself and Ashpitel to take a lease of the premises as entirely originating with Mr. Ashpitel, and being unwillingly entertained by John Tebbutt: he also said that Mr. Beauvoir's object in making the stipulation about underleases was not only to confer a benefit on the Tebbutts, but also

to provide for the security of the owner of the reversion of the estate.

All the Defendants stated the fact of Mr. Beauvoir having made a codicil bearing date in September, 1821, just before his death; and that the Respondent, as executor, paid legacies, thereby bequeathed, to the amount of 27,000*l.*; relying upon such payment as an admission by the Respondent of the testator's capacity for business at a period subsequent to his granting the lease.

On the 12th of February, 1827, a motion was made before the Lord Chancellor that the Plaintiffs might be at liberty to withdraw their replication and amend the bill, by introducing the letter of the 16th of December, 1820, and the notice of the Regent's Canal Company of the 11th of September, 1820; and also by introducing allegations and charges as to certain bills of costs charged by the Tebbutts on the Appellant, for the preparation of the agreement, lease, and bond. Upon the hearing of this motion, the Defendants undertook to produce as evidence in the cause the letter of the 16th of December, 1820, and the bill or bills of costs made out by the Defendants, Messrs. Tebbutt, or by the Defendant, Thomas Tebbutt the elder, to the Appellant; and also to admit in evidence the notice.

Pending the proceedings in the cause above mentioned, in which the Respondent was the Plaintiff, the Appellant had filed a cross-bill against the Respondent and Martin Whish, representing the lease of the 17th of January, 1821, as fairly obtained and valid: charging that the Respondent, after being fully apprised of all the circumstances attending the granting of such lease, had approved

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of and confirmed the same, and acted with the Appellant upon the footing thereof; and praying that the Defendants might make a full discovery of the several matters therein mentioned, with a view to assist the Appellant in his defence; that the Appellant might be declared to be entitled to the benefit of the covenant, for the apportionment of the rent contained in the indenture of lease; and that the Defendants might be decreed specifically to perform the same; and that all proper and necessary directions might be made for carrying the same into execution, and giving effect thereto; the Appellant being ready and willing, and thereby offering, from time to time, to concur in all such acts as might be necessary or fit to be by him done or performed in order to effectuate such purpose.

The Respondent in his answer to this bill said, that he believed the transaction in question was an imposition on Mr. Beauvoir, and that the lease was obtained at a very great undervalue by the contrivance of the Appellant and of the Tebbutts: he further said, that he had a conversation on the subject with Mr. Beauvoir, in April, 1821, when Mr. Beauvoir told the Respondent that he had signed a new lease for a long term to the Appellant; and that he had told Tebbutt, when he signed it, that he hoped it was all right; and that he (Tebbutt) was an honest man, as he could not see to read it, and understood but little about it, and he hoped what he was doing would not injure those who succeeded him; he denied that after he was informed of the circumstances relative to the lease, he in any ways approved of or confirmed it, and said that such acts as he performed relating thereto

were prior to his knowledge of those circumstances. He said he did not believe that Mr. Beauvoir, in granting such lease, intended to confer any further or greater benefit upon the Appellant than such as in ordinary cases might be conferred on a lessee at an adequate rent.

The answer of Martin Whish merely stated, that he had no personal knowledge of the transactions mentioned in the Appellant's bill; but that he had read over the Respondent's answer, and believed the same to be true, and submitted to be bound thereby.

In consequence of the Appellant's objection that the Respondent was not the heir at law to Mr. Beauvoir, the Respondent entered into evidence to prove his heirship, which he established to the satisfaction of His Majesty's Attorney-General; who having withdrawn his claim, did not join in the appeal.

After the answers of all the defendants had been filed, but before any evidence was taken on either side in the suit, a motion was made by the Respondent, the Plaintiff in the original cause, for an injunction to restrain the Appellant from digging brick earth and gravel on the premises. In support of and opposition to this motion, many affidavits as to the value of the property and circumstances under which the lease was obtained, were filed on both sides. The Vice-Chancellor, before whom the motion was originally made, pronounced the order for the injunction, dated the 23d day of January, 1825. The Appellant afterwards moved to discharge this order before the Lord Chancellor, and on the 4th day of March, 1826, the order for the injunction was discharged.

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In support of the allegations of the bill, in addition to the several letters and other documents before stated, the Respondent produced the following evidence:—

That Mr. Beauvoir resided entirely at Downham Hall during the last twenty years of his life, very retired, saw little company, and was, with respect to money matters, penurious, and disposed to make the most of his property. That Mr. Beauvoir was upwards of 84 years of age at the time when he executed the agreement and lease. It was also proved by James Dale, who saw Mr. Beauvoir almost daily, that he was during the whole of the month of January, 1821, confined to his bedroom by illness; and that such confinement continued with very little intermission up to the time of his death. His servant, James Barker, who attended on him constantly during the same period, said that he was very much indisposed, and in a declining and weak state of health; that from the 3d of January to the latter end of March he was confined to his bedroom; that from that time to the 8th of May he was able to move with assistance into his sitting-room for a few hours each day; but that after the latter period he was confined entirely to his bedroom until his death. In a letter written by Thomas Tebbutt the younger to the Respondent on the 18th of January, 1821, on his return from getting the lease executed, he stated that Mr. Beauvoir was rather better than when his father saw him on Saturday. Mrs. Deakin (one of the Appellant's witnesses) in a letter written by her to Mrs. Benyon in July, 1821, when she was staying with and attending upon Mr. Beauvoir, stated that Mr. Beauvoir had been then nine weeks confined to his

bed, and unable to move without assistance; that his sufferings were very great, and that he requested her to open a letter addressed to him; and in another letter, dated in August, 1821, she mentioned seeing him execute a deed, and her surprise at his being able to sign his name. Mrs. Deakin, in her cross-examination, admitted the statements contained in those letters to be accurate and true.

It was proved that for the last twenty or thirty years of Mr. Beauvoir's life Mr. Tebbutt acted as his solicitor; and that Mr. Beauvoir spoke of him as a person of skill and integrity, in whom he had the greatest confidence.

Mr. Dale stated, that on the 13th of January, 1821, he was applied to by Mr. Tebbutt, senior, to hear the agreement read to Mr. Beauvoir; that he attended accordingly in the bedroom to which Mr. Beauvoir was then confined by illness, and heard Mr. Tebbutt read over the draft agreement to him; that Mr. Beauvoir was very ill at the time; and after the draft had been read said nothing on the subject, and made no sign of approbation, or otherwise. He said that Mr. Tebbutt and the deponent then left the room, and the deponent expressed his surprise at Mr. Beauvoir's proposing to grant such a lease, and observed that it would be worth 10,000*l.* to the Appellant; at which Mr. Tebbutt laughed, and said, that, on the contrary, it would be a very good thing for Mr. Beauvoir: that he saw Mr. Beauvoir again in the evening of the same day, in his bedroom; and, from his conversation, he understood that he felt considerable doubt whether it was advisable or not for him to agree to grant such proposed new lease.

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To prove that the lease was beneficial to the Appellant, and injurious to Mr. Beauvoir, the Respondent examined nine surveyors, who concurred in representing the lease as most improvident, independently of the question of value; that they never knew an instance of so much land being let for building in one lot to the same person. They said that it was not a fair lease between lessor and lessee; that it was a building lease for the benefit of the tenant, and not for the benefit of the landlord; that it contained no covenants compelling the lessee to build at all, nor any covenants for defining the nature of the buildings to be erected, or for laying out the ground, which are usual in such leases; they further stated, that it contained no covenant for protecting certain other land of Mr. Beauvoir, which is surrounded by the demised estate; and that owing to the absence of such a covenant, such other land would be so injured in consequence of the mode in which the estate in question had been laid out, as to be lessened in annual value to any one except the Appellant to the amount of 30*l.* per acre. They stated that the covenant for the apportionment of rent was unusually framed, so as to depreciate the property by dividing the ground-rent too minutely; and they stated that in consequence of the absence of any covenant regulating the buildings, the houses built by the Appellant on the land were very small, and so badly built, that none of them would last to the end of the term, and some of them were not likely to last above thirty years.

On the question of value Mr. Ashpitel proved that he valued the estate at Mr. Beauvoir's desire in 1818, and he thought the valuation he then

made a just one, except that he intended the 4000*l.* per annum to be reserved, as the ultimate amount of a progressive rent; and also that he was not at the time of his valuation aware of Mr. Beauvoir's power of resumption, which, had he known it, would have occasioned him to make less reduction in respect to the Appellant's interest in the old lease. Mr. Ashpitel also proved, that on the occasion of the application he made to Mr. Beauvoir for a lease of part of the property in November 1820, he estimated that the estate, exclusive of the house and wharfs on the banks of the Regent's Canal, would let for 3765*l.* per annum; and the plan showing how the estate was to be laid out and let so as to produce that rental, was proved.

The nine surveyors who surveyed the estate for the purpose of ascertaining its value at the date of the lease, having been made acquainted with the old lease and the new lease, were examined as to the value of the estate, and stated the grounds of their opinion, and the mode of calculation by which they arrived at the results stated in the evidence. Each of them formed an estimate of what the value of the estate was in January, 1821, to be let on a building lease for ninety-nine years, subject to proper covenants; and they considered, in their estimate, the alleged difficulty and expense of drainage. The ultimate rent to be progressively attained in the course of seven or eight years, was stated at different sums, varying from 4550*l.*, the lowest, to 5453*l.* per annum, which was the highest. The average of the nine statements of value was 5033*l.* 6*s.* 8*d.* per annum, to be paid from the seventh or eighth year during the remainder of the term; to obtain which rent, it was

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stated, no outlay on the part of the landlord would have been necessary. They then proceeded to estimate the value of the fee-simple of the estate in January, 1821, under the two different circumstances of its being free from any lease, and of its being subject to the lease of the 17th of January, 1821. Their statements of value in the first case varied from 73,826*l.* to 92,707*l.* 8*s.* 7*d.* (making an average of 81,161*l.* 9*s.* 10*d.*) and in the second case, from 22,930*l.* to 24,614*l.* (making an average of 23,245*l.* 10*s.* 8*d.* per annum). Eight of the surveyors then valued the interest of the Appellant in his old lease in January, 1821, under two supposed cases (*viz.*) considering the old lease as containing no power of resumption by the landlord of any part of the property, and also considering that such a power existed and extended over all the land, except the buildings and garden; in the first case their estimates of value varied from 1525*l.* to 2640*l.* (making an average of 2203*l.* 7*s.* 6*d.*) and in the latter from 286*l.* to 1980*l.* (making an average of 712*l.* 3*s.* 10*d.*).

Witnesses were also examined and depositions taken as to the prices at which portions of the estate in question, and of adjoining properties of similar value had been sold and let. Mr. James Morgan, the surveyor to the Regent's Canal Company, proved that in January, 1819, he valued part of the premises which was to be purchased by that company, consisting of three acres and twelve perches. Mr. Ashpitel attended as Mr. Beauvoir's surveyor, and insisted on the land being valued as ripe for building: it was so valued, both in calculating Mr. Beauvoir's interest and the Appellant's; the former was paid 2334*l.* 10*s.* for his

interest, and the Appellant 218*l*. ; making together 2547*l*. 10*s*. Mr. Morgan further stated, that the company at the same time purchased other land in the neighbourhood from Mr. Scott, Mr. Sturt, Mr. Lee Acton, and the Appellant, and that the prices paid to those persons varied from 648*l*. to 739*l*. 10*s*.

Mr. Morgan's statements respecting the valuation of that part of Mr. Beauvoir's estate taken by the Canal Company were confirmed by Mr. Ashpitel, who added, that Mr. Morgan objected to the land being valued as building ground, and that Mr. Robinson, a surveyor, was called in as a referee, who decided that it ought to be so valued.

Mr. Ashpitel further proved, that before January, 1821, he let for building some land of Mr. Tyssen's, which was farther from London than the estate in question, and less eligible for building, and which had been dug equally low for bricks; and that pieces consisting of front ground only were let at 40*l*. per acre, and those which comprised both front and back ground at 20*l*. per acre. Thomas Freeman stated, that in 1804 he took of the Appellant a ninety-nine years' lease of 3*A.* 0*R.* 30*P.* of land adjoining Balmes Farm. The rent was to be progressive for thirteen years, and at the end of that time to amount to 150*l*. per annum; and on his cross-examination by the Appellant, Mr. Freeman stated that he did not think that rent was too high.

Divers other witnesses were examined to the same point.

The evidence as to the rents at which lands adjoining the estate in question, or only divided

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therefrom by the turnpike road, were let in or prior to January, 1821, for building purposes, was that they were let at an average rent per acre of 43*l.* 2*d.*

The evidence of the Appellant's tenants as to rents paid for lands belonging to the Appellant, nearly adjoining the estate, used as garden ground, in and prior to 1821, was that they were let at an average rent per acre of 9*l.* 4*s.* 9*d.*

Upon calculation of the amount of the rents reserved upon the underleases granted, or agreed to be granted by the Appellant of the property in question, as set forth in the schedules to the Appellant's answers, it appeared, that at the time of filing the last answer, which was in July, 1824, he had let or agreed to let, several pieces of the estate at progressive rents, which by Michaelmas, 1832, would amount to 2776*l.* per annum; that such pieces comprised thirty-six acres and a quarter, besides two acres employed in constructing a basin, being at the rate of 72*l.* per acre, including such two acres. Part of this land was let as wharfs at 20*s.* per foot frontage, and there were four hundred and forty feet of such frontage still unlet when the Appellant's last answer was filed.

Evidence was also given of the prices which the Appellant required for the different parts of the estate; and that if those prices could be realized the Appellant would obtain a rental from the estate amounting to about 8991*l.* 10*s.* per annum, independently of that part of the estate converted into wharfs, and lying on the banks of the Regent's Canal.

The Appellant having contended, that he had

been able to turn the estate to advantage only by a very large expenditure in making roads, excavating a basin, constructing wharfs, &c., the heads of which expenditure were stated to be, the filling-up and levelling the lands, making foot-paths and roads, making a circle intended as the centre of a square, forming a basin and bridge to communicate with the Regent's Canal, in making wharfs, in payments to surveyors, for laying out the estate for building purposes, in repairing the dwelling-house, and in losses by advances to builders who had abandoned their contracts, the Respondent, to rebut these allegations, read the lease of 1802, by which the Appellant was bound to lay level, plain, and dry, all the land dug for brick-earth, and also to keep the house and other buildings in repair. It was also proved, that a great quantity of gravel had been dug by the Appellant from the estate, and part thereof sold; that in all the leases and contracts for leases of wharfs which had been executed by the Appellant, he had stipulated for the expenditure of money by the lessees, in fencing and inclosing the land or otherwise, and had restrained them from landing or selling bricks or tiles, to the prejudice of his own trade therein; that in his building-leases or contracts, he had thrown on the lessees the expense of laying-out the squares and streets, and making and repairing the drains and sewers; and in cases where he had advanced money, he had made the ground and buildings on it a security for such advances and the interest thereon; and sometimes stipulated that in default of payment the money should be converted into additional rent, at the rate of 8*l.* per cent. With respect to the expense of the basin and bridge, Mr. Milne estimated the costs of the

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former at 2000*l.*; Mr. Morgan at 3803*l.* 6*s.* 6*d.*, including materials. Mr. Boardman (the excavator employed by the Appellant) stated, that he was paid 900*l.* for excavating the basin, and 300*l.* for leveling the estate; and admitted that great part of the earth and gravel dug out of the basin was used in making the roads. Mr. Morgan proved that the Appellant was permitted by the Regent's Canal Company to make the basin, not as a personal favour, but as one which would have been granted to any person; and that in all cases, where a slip of land belonging to the company intervened between the canal and the adjacent land, they allowed the proprietor of such adjacent land to take possession of the slip for the purpose of making wharfs.

To prove that the estate was in 1821 ripe for building, and was so considered by the Appellant, Frederick Snee, the clerk to the company, proved, that on the 14th of December, 1820, the Messrs. Tebbutt, as agents of Mr. Beauvoir, were served with notice to make wharfs along the canal, or that the company of proprietors would take such land and construct the wharfs; and Mr. John Lake proved the application of the Appellant to parliament, in the year 1823, for an act to watch, pave, light, and drain the estate, which had at that time been laid out for building purposes. Mr. James Beek proved that the estate was capable of drainage, and showed how it might have been done. Mr. John Wright Unwin, who was clerk to the Commissioners of Sewers for the Tower Hamlets, proved an application in 1821 by the Appellant, who was himself one of the commissioners, for permission to drain the estate; and that an order was

made for such drainage, agreeably to a plan produced by the Appellant.

It was proved by Mr. Tyssen, that the Appellants had for some years prior to January 1821 resided within the parish of Hackney; that he was the owner of lands there, which were adjoining or near to the estate in question; that he was at the time of obtaining the new lease letting parts of his own land on building leases; and that he took on lease some land of the Deponent in the same parish. The same witness also stated, that Tebbutt, senior, resided in Hackney for some years prior to 1821; that he had been for some time steward of the manor, and managed estates of the Deponent there adjoining Balmes Farm, to the extent of 1000 acres; that he had made the leases, and received the rents of such estates, and knew the usual rate of letting, and the value of the land. Mr. Ashpitel proved his communication to Mr. Tebbutt, senior, of the value of the estate, and Tebbutt's observations thereon; and that Tebbutt, senior, acted as Mr. Beauvoir's solicitor in the purchase of the Canal Company.

The letters which passed between the firm of Tebbutt and Sons and that of Smith, Lake, and Wilkinson, between the 28th of December, 1822, and the 15th of April, 1823, were produced, to prove the gradual mode in which the fraud was discovered, to explain the delay of the Respondent in commencing proceedings, and rebut the charge of his having confirmed the lease, with full knowledge of all the circumstances. In one of the letters of Messrs. Tebbutt, dated the 29th of March, 1823, speaking of the Respondent's intention of having the estate valued, they insisted that it was of

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no consequence what the value of the estate was, since Mr. Beauvoir had a right to let his ground on what terms he thought proper. And Mr. John Lake deposed to a conversation between himself and Thomas Tebbutt, junior, on the 10th of April, 1823, in which the latter expressly denied that any instrument had been executed for carrying into effect the agreement as to the law business. Mr. Lake also stated, that he never heard of the existence of either the agreement or the bond till the latter end of March, 1823, nor became acquainted with the nature of the latter instrument until the 22d of April following; and that the Respondent first heard of the agreement through the Deponent.

The draft bond having been produced, John Tebbutt made an affidavit respecting the circumstances under which it had been framed, which is dated the 9th of July, 1825, and in which he represented the recitals in the draft bond as having been inserted and altered in such manner as seemed to the parties best calculated to support the validity of the bond, and said, that Mr. Beauvoir made the provision in the agreement, respecting the underleases, not at all with any view to retain any control in himself over any of the leases to be granted of the property, or the person to be employed in preparing them, but solely from a motive of kindness to Thomas Tebbutt the elder and his sons, and for their benefit.

On the part of the Appellant witnesses were examined to prove that, under the circumstances, the lease was not at an undervalue; that it was a matter of speculation, and might have turned out a losing bargain. He also examined the Tebbutts, father

and sons, as to the circumstances under which the memorandum of agreement and the lease were obtained.

Anna Maria Deakin, who was the widow of Osmond Beauvoir, the eldest brother of Peter Beauvoir, Charlotte Dennis, the housekeeper of Peter Beauvoir, James Barker his footman, who was also an attesting witness to the lease, John Bassom his coachman, the Reverend John Notlidge his curate, and Doctor Adams his medical attendant, deposed to his competence to business at the time of granting the lease, his having subsequently transacted other business of a like nature, and his having frequently mentioned and approved of the lease in question, and expressed his good wishes for the Appellant's success in his undertaking. The Appellant then produced the depositions in the cause, of eleven surveyors and builders, who stated, that in their opinions the rents reserved by the lease were the full or more than the full value of the premises; that no person but the Appellant, from his extensive connections among builders, could have taken the lease to advantage; that it would have been improper to limit the class of buildings to be erected on the premises; and that the property had been so changed in appearance between the date of the lease and April 1823, when it was first surveyed by surveyors produced as witnesses on the part of Respondent, that it was at the latter period impossible for any man not previously acquainted with the property to estimate its value at the date of the lease. Besides this evidence as to the value, the Appellant also produced the depositions of William Hobson, the owner of a large quantity of land in the immediate neighbourhood of

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the estate in question, of John Whitling, the owner of several hundred houses in the vicinity of the metropolis, and of Daniel Austin, who held forty-five acres of building-land in the vicinity of the estate in question, who concurred in stating that the rent reserved upon the Appellant's lease was full and sufficient, and even that it was exorbitant, and such as they would not have given for the estate, and that no other person but the Appellant could have made the speculation answer. John Whitling said that he would not have taken the lease for 10,000*l.*; and Daniel Austin said, that he held lands which he had taken on terms one hundred per cent. more advantageous. James Thomas Boston, and James Kebbell, who were employed in the management of the buildings erected on the premises, deposed, that the rents reserved by the lease were in their judgment sufficient, and also stated the outlay and expenditure which had been made on the estate. Thomas Boardman and John Butler were examined to show the difficulty of procuring a sufficient drainage of the estate, so as to render it fit for building purposes; and Mr. John Lake, solicitor of Mr. Richard Benyon de Beauvoir, proved the fact of his having surveyed the estate, in company with his client, in May 1822, that the works were then in progress, and that the Respondent did not object to them. William Shepard, a partner in the banking-house of Messrs. Child and Company, proved the receipts by him from the Appellant of the rents under the lease, on the Respondent's account, to Michaelmas, 1822, and the payment of a check of Peter Beauvoir, drawn in favour of Thomas Tebbutt the elder, for a considerable sum of money, in April 1821, to

show Mr. Beauvoir's competence to business subsequent to the lease.

The depositions of Thomas Tebbutt the elder, Thomas Tebbutt the younger, and John Tebbutt, were offered in evidence on the part of Appellant; but the competence of these witnesses being objected to by the Respondent, their evidence was rejected by the Court.

The rule for publication of evidence having passed, an order was obtained, that the evidence on both sides, in the original cause, should be read also as evidence in the cross cause, and that both causes should be heard together. Both causes were accordingly set down for hearing, before his Honour the Vice-Chancellor, on the 4th of July, 1828, when it was arranged between the Court and the counsel on both sides, that, inasmuch as the question in the cross cause was subordinate to, and depended upon the result of the original suit, the original cause should be first argued. The original cause was accordingly argued on the 4th of July, 1828, and on several subsequent days in the same year.

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By the decree, which is entitled as made in both the original and cross causes, and is dated the 12th of January, 1829, it was declared that the agreement in the pleadings mentioned to bear date the 13th day of January, 1821, signed by the Reverend Peter Beauvoir, deceased, and the Appellant; and also the indenture of lease, in the pleadings mentioned to bear date the 17th day of January, 1821, granted by the said Peter Beauvoir to the Appellant, ought re-

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spectively to be set aside in equity, as having been unfairly and improperly obtained: but that the Respondent ought to confirm all underleases and binding agreements for underleases then subsisting, bona fide made or entered into by the Appellant as lessee as aforesaid, whether prior or subsequent to the filing of the bill in the first-mentioned cause up to the date of the decree: and that the Respondent ought also to indemnify the Appellant against all covenants on his part contained in such contracts and underleases, and which the possession of the estate, as assignee, would enable the Respondent to perform in respect of any breaches of such covenants, to be committed subsequent to the assignment thereafter directed to be made: and the Respondent ought also to pay or allow to the Appellant all expenditure made by him up to the date of this decree, in or about the said estate, with reference to the said lease of the 17th day of January, 1821, and also all advances made by the Appellant, or on his behalf, in money or building materials up to the date of this decree, to persons to whom the Appellant had demised or agreed to demise any part of the said estate, in pursuance of engagements in such demises or agreements, on having a transfer of all securities made or given to the Appellant for the same; and in case any part of such advances had been redeemed or converted into the purchase of ground rents and buildings on the said estate, the same rents and buildings were to be transferred to the Respondent, or as he should direct, by the Appellant and all other proper parties. (Then followed very long and minute directions consequent upon the decree.) And it was

further decreed, that the bill in the cross suit should be dismissed.

The Appeal was against the rejection of the evidence and the decree in the original and cross suits, and was heard in 1832.

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### For the Appellant.\*

The Tebbutts were in this case made parties as defendants, to deprive Rhodes of the benefit of their evidence. The practice of permitting parties to be made co-defendants for the purpose of costs, is established and cannot now be disputed, although it is perhaps objectionable in principle, and frequently used improperly and oppressively. Upon the motion before Lord Eldon, he offered to the parties the direction of an issue, in which the Tebbutts might have been examined. It was also proposed that the answer of the co-defendants should be used. But the offer and proposal were refused, and, consequently, the case was from necessity determined upon affidavits. Upon the question of value, Lord Eldon expressed an opinion in favour of Mr. Rhodes. If the case had been heard before him, it would not have been decided without further enquiry.

In such cases as these, where parties, who in effect are mere witnesses, are made co-defendants, for the indirect purpose of precluding their evidence, the Court ought to direct an enquiry by issue or otherwise.

Courts of justice, as well at law as in equity,

\* The arguments were long and elaborate. The report is confined chiefly to that part of the argument which relates to the questions of parties and evidence.

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where persons being only witnesses are made parties to the suit, direct a release, or put the parties out of the record, that they may be examined as witnesses. At law, this is done in the case of indictments, and in equity frequently, as in the late case of *Small v. Attwood*\*, in the Exchequer. In *Lewis v. Colmar*†, lately before the Master of the Rolls, he read the answer of Colman as evidence, and upon that, as part of the evidence, dismissed the bill. If at the hearing, it appears that a defendant is not entitled, the bill as to him ought to be dismissed if required, in order that his evidence might be given. In this case the Tebbutts disclaimed. But the Plaintiff compelled them to put in answers, and retained them as parties, in order to exclude their evidence.

For the Respondent.

The lease is properly annulled on the ground of fraud as to the value of the property, and also on account of the relation of the parties. It was consummated by the aid of the confidential solicitor of the lessor, and he took a beneficial interest under the stipulations of the lease. He, therefore, was properly made a party to the suit, according to the practice of the Court, which stands on sound principles. If it could have been shown at the hearing that he had no interest, the bill, as to him, would have been dismissed. It is hard, as they argue, to permit a plaintiff to deprive a defendant of his witnesses, by making them parties. But it would be harder on the plaintiff to permit him to make use of his accomplices as witnesses. The stipulation for the employment of Tebbutt, and the

\* In the Exchequer, and on appeal to D. P. now pending.

† At the Rolls, Michaelmas Term, 1831.

compensation substituted by the bond of 10,000*l.*, for taking away that benefit, are conclusive as to the nature of the transaction. This was so much of benefit to the lessee and loss to the lessor; or if it was a gift by the lessee, then it was clearly a bribe to the solicitor of the lessor, for procuring a beneficial lease. If it could be established, that it was intended by the lessor that Tebbutt should be employed as solicitor for his security, then it was a fraud upon him to omit the stipulation, and convert it into a pecuniary compensation for the benefit of the solicitor. It is a species of fraud which must affect the solicitor as much as the lessee.

If the question of value were doubtful, the case is decided by the relation of the parties and the intervention of the solicitor; under such circumstances, it is for the party contending for the validity of the leases to show, as in the cases of expectant heirs and reversionary interests, that the full value has been given. In *Small v. Attwood* the parties charged as agents, on the ground that they had received money, denied the fact, and there being no proof of the allegation by the plaintiff, the evidence of the co-defendant was read. So in *Lewis v. Colmar* the answer was read, because it appeared that the party had no interest, and was not an accomplice in the fraud. As to the necessity of an issue,—what is there to be tried? not the fraud; for a jury cannot be judges of what is fraud in a court of equity. Upon the question of value there is no further evidence to be sent to a jury. It is all before the House, and they are better qualified to judge, and ought to decide the question of value. When the case was before Lord Eldon, there was no evidence as to

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value, and then it might properly, as proposed, be sent to a jury.

The doctrine is established, that in all purchases where the purchaser colludes with the agent of the vendor to his prejudice, the contract cannot stand: *Bailey v. Watkins*.<sup>\*</sup> Another principle is, that where the consideration is mixed, and it is contended to be in part bounty, the donor must be fully informed of all the circumstances of the case to uphold the contract. These doctrines appear in the late cases of *Selsey v. Rhodes*<sup>†</sup> and in *Harris v. Tremenhoe*.<sup>‡</sup> As to the argument of confirmation and acquiescence, the ancestor died in ignorance of the circumstances on which the claim is founded. The bond was not discovered until just before filing the bill. The law bills were not produced until the cause came on for hearing. Acquiescence in a wrong which arises out of facts, can only be urged against a party who has a full knowledge of the facts.

The contract is entire and cannot be divided, so as to make it good as to one of the parties.

For the Appellants, *Mr. Pepys* and *Mr. Ching*.

For the Respondents, the Solicitor General (*Sir W. Horne*), and *Sir Edw. Sugden*.

In the course of the argument, the following observations were made:—

April 2.

*Lord Eldon*.—Can the stipulation that Tebbutt should be employed as solicitor be good in law? The case, upon the order of the Vice Chancellor granting the injunction on the evidence of a great

<sup>\*</sup> D. P. 1825. The case will be reported in the progress of the Old Series. See a short abstract in a note at the end of this case.

<sup>†</sup> 2 Sim. and Stu. 41. And *ante*, New Series, vol. i. p. 1.

<sup>‡</sup> 15 Ves. 34.

variety of witnesses, was the same as before me. I repeat, that granting or refusing the injunction, as the case then stood, does not bear essentially upon the question now before the House. The injunction was granted upon the ground that the evidence established the allegation of undervalue.

The bill, as one material ground of relief, puts the case upon fraud and imposition; but the Court has not made a declaration to that effect. The words of the decree are, that the lease has been "unfairly and improperly obtained." This is hardly sufficient, where the character of the transaction is so attacked. What the words mean in legal apprehension, I scarcely know. The decree should have been either in the words of the prayer of the bill, or the words "unfairly and improperly obtained" should have been further explained.

The injunction was dissolved on the ground that the enjoyment of the premises would have been annihilated, if it had been continued to the hearing of the cause, when it might have turned out that the Defendant was entitled to the benefit of the contract. The question of value was very important, and could not have been properly tried without having before the jury the terms of the old lease. If it can be made out that 10,000*l.* in the value of the lease was lost by the effect of the bond (a result which it might be difficult to make out), that also ought to be before the jury. The dissolution of the injunction by no means decides the question now before us.

When this case was before me, what struck me upon the question of preventing the Defendant Rhodes from having the enjoyment in person until

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the cause could be heard was this: that if it turned out that sufficient value was given, the consequence would be, that between the period at which the Vice Chancellor granted the injunction and the period when the cause should be heard, it would be taking away from the tenant the enjoyment which it might turn out, upon the hearing of the cause, he was entitled to. If that was unjustly taken away from him, it must necessarily have operated most injuriously upon the whole scheme of management, considering the nature of the lease which he had obtained. If it might have turned out, on the other hand, that he had given too little for the lease, it appears to me that would have been a case for the appointment of a receiver, with directions that he should carry on the scheme, rather than for an injunction, which would take away from the tenant the enjoyment in the mean time. If they had taken the issue upon value, and it had turned out that there had not been value enough given for it, I should then have supported the injunction. I certainly had formed an opinion upon hearing the motion that there was not a fair ground for the injunction. Nobody doubts that Mr. Rhodes was a man of substance enough to have accounted for all the brick earth, and to have made compensation for all he should do with the estate, if it turned out on the hearing of the cause that he was not entitled to have a lease. I thought I should do a great injury one way, by interrupting the possession; and that I should be doing no injury, finally, the other way.

I was affected also by another consideration, and a most material consideration it is in cases of this kind; namely, that there is not a charge in the

bill that does not go directly upon fraud. I never meant, however, by any observations upon that subject, to say that although there might not be fraud, — what is strictly called fraud as between a landlord and a tenant in such an agreement as this, — that, on the other hand, it appearing the tenant had employed as his agents the Messrs. Tebbutts, who were also agents on the other side for the landlord, — I never meant to intimate that it might not turn out to be a case in which the Court would interfere upon the ground of the doctrine of equity, applicable to landowners and their stewards; or with respect to a mortgagor and a mortgagee, if that mortgagee was an attorney in whom confidence was placed, as in the case of *Walmesley v. Booth* \*, and all the other cases in which it is not positive fraud that is to be made out, but a breach of the duty of the person in whom confidence is placed; that breach of duty consisting in his not making all the communications which the reposing that confidence in him requires from him. And I think that there are many cases, several of which have occurred in my time, in which it is admitted that as to an act, which, as between man and man, would be an act not only not blameable on the part of the person who reaped the benefit of it, but might be very laudable on the part of the person who gave the benefit of the act to such an individual: — yet the case would be very different if the transaction took place between A. and B., A. reposing confidence in B., and B. not giving him all the information that might enable him to judge for himself upon a full understanding

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\* 2 Atk. 30. See also *Newman v. Payne*, 2 Ves. jun. 199.  
4 Bro. C. C. 350. *Lewis v. Morgan*, 3 Aust. 769., and *Plenderleath v. Fraser*, 3 Ves. & Bea. 176.

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of what the lease was, and what the benefit would be. All that doctrine of equity appeared to me to be open for consideration in the further discussion of the cause; and, accordingly, in these papers you will find that there is evidence very well worthy of attention upon this subject. I am not now meaning to intimate what the result or the effect of that evidence may be; but there was evidence, of which I knew, and could know, nothing at the time when I dissolved the injunction. I am, therefore, anxious now to say, — and it is for this reason, principally, that I have attended this cause, — that my dissolving that injunction proceeded on no other ground than this: that it was my duty then to consider whether I could take away the *interim* enjoyment from the tenant before I knew what the ultimate result would be of all the further evidence that might be given, not one tittle of which was at that time before me. As to the order for the dissolution of the injunction, whether I was right or wrong, it is happy for me that others are now to judge; but I think it my duty to declare that all I meant by dissolving that injunction was this: that if it turned out that the tenant had given sufficient value for the lease, I did not think myself, nor did I think the Vice Chancellor of that day, justified in interrupting the *interim* enjoyment; the value being, in the mean time, by the verdict, to be ascertained. If the verdict turned out to be upon an issue whether a just value was given or not, I thought I should not feel justified in destroying the *interim* enjoyment; and that I should do more mischief by destroying that *interim* enjoyment whatever might be the result of the cause, than I should do by dissolving the injunction.

I have said these few words on the case as it is before your Lordships now, in order that it may not be understood that I have formed a premature opinion in this case as to the application of some of the most sacred principles of the Courts of Equity ; for I say that my mind was not at all engaged in the application of those principles at that early stage of the cause. I beg that nothing I have now said may have the least prejudice, either as regards the counsel or the persons concerned in discussing the whole of the case upon the present state of the record.

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*The Lord Chancellor.* — The question is, *April 5.* whether the lease was obtained by fraud and imposition, and it might be such fraud and imposition as a judge and jury could try (they knowing what they call fraud and imposition at common law). But the finding might negative that, and they might say that there was no such fraud and imposition as the Court of Chancery had sent to them to try, and still might have left a question between the parties ; namely, considering the relation in which the parties stood to each other — the Tebbutts' position with respect to Mr. Beauvoir rather than Mr. Rhodes, who was the former tenant ; and considering the peculiar circumstances under which Mr. Rhodes (as it is said through Mr. Tebbutt) obtained that lease — whether the proof of adequate value was not thrown upon the party obtaining the lease. Then another consideration might arise as to the adequacy of the value ; and it might be a question of adequate or inadequate value, absolutely so called ; that is to say, whether it was such a value, such terms, as might have been obtained from any solvent and responsible tenant, though a stranger. That would dispose of the question, if it were proved that such a consideration were given for the lease as

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any stranger, solvent and responsible to perform his engagements, would have given for it, supposing that the question whether an adequate value was given, were the only question. But this other question might arise : Suppose the terms were not such as any solvent or responsible tenant would give, might not Mr. Beauvoir have intended to favour Mr. Rhodes ? Then there would on this point be two questions to be tried :—First, Did he or did he not intend to give a favour or benefit to Mr. Rhodes ? Secondly, if he did intend to give such favour or benefit to Mr. Rhodes, whether (regard being had to that intention) the terms obtained were such as ought to have been obtained under such circumstances ? All that was thrown out in the former proceeding as to an issue, was to try whether the lease was obtained by fraud and imposition, which, I apprehend, if it had gone to be tried at law, would only reach to one enquiry ; but the parties would have had the benefit of examining the Tebbutts, and it might be advantageous with respect to Dale's evidence. Mr. Dale says a conversation took place in the evening between Mr. Beauvoir and himself with respect to this lease ; and, he says in the course of the conversation that he understood from Mr. Beauvoir (the words are, that he understood) that he had doubts whether he should grant the lease or not. The words are, “ that in the evening of the same “ day he again saw the said Peter Beauvoir in his “ bedroom, when some conversation took place between Mr. Beauvoir and himself in regard to the “ proposed agreement ; and that he understood from “ the conversation of Peter Beauvoir that he felt “ considerable doubt as to whether it was advisable “ or not for him to agree to grant such proposed new “ lease.” Now, if one had had the very words which

Mr. Beauvoir used, we should have been able to tell more about it. The solicitor was made the instrument by a stranger for obtaining an advantageous lease from the landlord (who was the client of the solicitor), which the solicitor himself, if it had been for his own benefit, could not have obtained. He must have proved that an adequate consideration was given, not adequate in the second sense, but in the first sense and best sense, namely, the utmost that could have been got from a solvent person.

*Lord Plunkett.* — It is competent for the Court of Equity to decide upon the question of value without an issue. What you rely upon is this — that the Respondent has not made out a case of undervalue; that is the proposition you maintain: but under the circumstances of this case the proof of full value must be thrown upon the Appellant, and therefore it would be for him to say upon the evidence already given that an issue is indispensable, or that the proof of full value has been made out sufficiently by the Appellant in this case.

*The Lord Chancellor.* — There is another thing that struck me: without saying that the lease is to be set aside upon the ground of fraud and imposition, may there not be such dealing on the part of Mr. Tebbutt and Mr. Rhodes, evidenced in this correspondence, as should throw the proof of the fulness of consideration upon them without going so far as to say that there is actually such fraud as to entitle the Court, without any consideration of value, to set it aside? In other words, there are two ways in which misconduct or suspicious conduct might shake the title: one is, that though the full consideration was given, it was such as to make the transaction invalid though the full

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consideration had been paid ; but the other is, that it is not sufficient to make it invalid if a full consideration had been obtained, but it is sufficient to throw upon the party seeking to obtain the benefit of it the proof of the fulness of consideration. I throw out for the consideration of the counsel on both sides these observations, arising from a consideration of the whole case since the last hearing of the cause by the three noble and learned Lords whose valuable assistance we have on the present occasion.

*Lord Plunkett.*—How would the learned Judge have to charge the jury upon an issue of fraud or no fraud? I own I should have very great difficulty to know how to charge a jury so as to come at the real question at law.

*The Lord Chancellor.*—If the jury were to find fraud, that would decide the cause, and there is no doubt there would then be an end of the case ; but if they found the other way, it would not put an end to the case. There still might be enough to constitute fraud in a Court of Equity, although the judge and jury might not consider it fraudulent. Your Lordships have now heard the arguments on both sides on the very voluminous proceedings in this case, which contain a great variety of circumstances, some of them requiring very careful and minute investigation before we come to a final determination upon the question now immediately before us ; whether you affirm, or reverse, or alter, the decree appealed from, or put the matter, which is the other course, if not the whole, at least some of the leading matters, into a train of further investigation. Many questions undoubtedly arise here for consideration, and depending more or less

upon a minute investigation of the facts ; as, first, Whether Mr. Tebbutt exceeded the bounds which were prescribed to him by the situation in which he stood in relation both to Mr. Rhodes and to Mr. Beauvoir ; whether he did that which is naturally incident to, and one may say almost unavoidably follows from the anomalous and somewhat inconsistent situation in which a professional gentleman is placed who is acting for two different parties, and the more especially when those two parties are in conflicting interests, as buyer and seller, landlord and tenant, the exposor to sale or to let and the purchaser of the subject matter of sale or lease ; whether Mr. Tebbutt went beyond the line of duty, and whether there was that suspicious conduct (I wish to use the lightest term) which a man must always unavoidably appear to pursue who stands in this critical and extremely difficult relation between the two parties. Next, if he did, whether what was done through him, and what was obtained by Mr. Rhodes through him, might be said to have been obtained by fraud and imposition ; such fraud and imposition, as if tried by a jury, would lead to a verdict that it was obtained by fraud and imposition or not, and which in one event would at once set aside the whole transaction ; (but short of that there might be misconduct on the part of those parties, and this seems to be the view the Vice Chancellor took of the case, and which accounts for the somewhat unusual expressions in the decree, when it is set aside, not on the ground of fraud expressly stated, but of unfairness and impropriety) ; finally, whether or not there was such conduct on the part of Mr. Rhodes and Messrs. Tebbutts with respect to Mr. Beauvoir, in

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obtaining that lease, as would throw upon them the proof that an adequate consideration was given for it. In this case the adequacy of consideration divides itself into two questions; the one relating to the relation in which Mr. Beauvoir and Mr. Rhodes stood, and that would be whether he meant to favour Mr. Rhodes, and if he so meant to favour him, then the question would arise, whether the terms upon which Mr. Rhodes obtained this lease from Mr. Beauvoir were such as regard being had to that supposed favour intended by Mr. Beauvoir, his landlord, were such as not to go beyond the limit of favour, that is, were such as, even assuming that he intended to favour him, the lease so obtained ought not to stand. These are the questions which arise in the course of this case, and which are necessary to be minutely and separately considered before your Lordships come to a decision. Your Lordships, as I understand, are desirous to have (I entirely agree in that wish) further time to consider the matter, and with that view I move your Lordships that the further consideration of this case do stand adjourned.

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Judgment was delivered, on the motion of the Lord Chancellor, with the following observations : —

Aug. 16.

The noble and learned Lords, the benefit of whose assistance we had at the hearing of this case, have conceived in opinion with me that it is fit that certain issues should be tried; and I have to propose such issues, giving direction by way of the substance of those issues which ought to be framed, in order that this matter may be satisfactorily investigated. The proposition which I have to sub-

mit to your Lordships is, that the matter be remitted to the Vice Chancellor—to the Court of Chancery, indeed (from which the appeal came), with directions to frame issues for the trial of the matter; the substance of which issues will be contained in the directions to be given; and those directions and instructions are to this effect:—The first issue is to be generally, Was the lease obtained by fraud and imposition? The second, Did Mr. Peter Beauvoir know at the time he executed the agreement that Tebbutt was Rhodes's solicitor as well as his own? The third, Was the lease granted at an undervalue, supposing Mr. Rhodes was a stranger? The fourth, Did Mr. Peter Beauvoir intend to favour Rhodes in the lease? The fifth, Was the lease granted at an undervalue, supposing Mr. Peter Beauvoir intended to favour Rhodes? To which I should have added directions to examine Thomas Tebbutt, who *was* made a defendant; but that, I understand, can be no longer operative, because it appears that that person has since died. Any questions that may arise as to the mode of framing these issues, or as to any directions to be given, touching any witnesses to be examined, or depositions to be read on the trial of these issues, as consistent with former practice, will be most conveniently and competently made by the Court to which this case shall be remitted.

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It is ordered and adjudged, that the cause be remitted to the Court of Chancery, with instructions to his honour the Vice Chancellor to give the necessary directions, according to the use of the Court, for the framing of issues for trial in a court of law, of which the following is the substance; that is to say, first, Was the lease obtained by fraud

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and imposition? Secondly, Did Peter Beauvoir know when he executed the agreement that Tebutt was Rhodes's solicitor, as well as his own, in this matter? Thirdly, Was the lease granted at an undervalue, supposing Rhodes had been a stranger? Fourthly, Did Peter Beauvoir intend to favour Rhodes in the lease? Fifthly, Was the lease granted at an undervalue, supposing Peter Beauvoir intended to favour Rhodes? And it is further ordered, that the Vice Chancellor do give directions as to the examination of any particular persons or person, or the reading of any particular depositions, and generally make such orders and give such directions relative to the trial of such issues as he shall think proper; and do also make such orders respecting the proceedings now pending in the said causes, or any of them, and respecting the further proceedings therein, as shall be just and consistent with this judgment.

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In December, 1832, a motion was made before the Vice Chancellor, to direct the issues according to the order of the House of Lords; but he, conceiving that he had no jurisdiction, refused to make any order, whereupon the Plaintiffs in the suit made a similar motion before the Lord Chancellor, who, after hearing the parties, made the following order.

His Lordship doth order, that the parties do proceed to a trial or trials at law, in his Majesty's Court of Exchequer, at such time as the Lord Chief Baron of that Court shall appoint, upon the following issues, viz.: First, Was the lease, bearing date the 17th day of January, 1821, in the pleadings mentioned, granted by Peter Beauvoir, deceased, therein named, to the Defendant, William Rhodes,

obtained by fraud and imposition? Secondly, Did Peter Beauvoir, deceased, in the pleadings named, know, when he executed the agreement, bearing date the 13th and 15th days of January, 1821, in the pleadings mentioned, that Thomas Tebbutt the elder, therein named, was the Defendant William Rhodes's solicitor, and acting for him in the matter of the said agreement, or of the lease, bearing date the 17th day of January, 1821, in the pleadings mentioned, as well as for himself the said Peter Beauvoir? Thirdly, Was the lease bearing date the 17th day of January, 1821, in the pleadings mentioned, granted at an undervalue? Fourthly, Did Peter Beauvoir, deceased, in the pleadings named, intend to favour the Defendant, William Rhodes, in respect of the terms on which the lease bearing date the 17th day of January, 1821, in the pleadings mentioned, should be granted? Fifthly, Was the lease bearing date the 17th day of January, 1821, in the pleadings mentioned, granted at an undervalue, supposing Peter Beauvoir, deceased, in the pleadings named, intended to favour the Defendant, William Rhodes? And in the first of such issues it is ordered, that Richard Benyon de Beauvoir (the Plaintiff in the first and the Defendant in the second mentioned causes) be Plaintiff at law, and William Rhodes (the Defendant in the first and Plaintiff in the second mentioned causes) be Defendant at law. And in the second of such issues it is ordered, that the said William Rhodes be Plaintiff at law, and the said Richard Benyon de Beauvoir be Defendant at law. And it is ordered, that in the third of such issues the said Richard Benyon de Beauvoir be Plaintiff at law, and the said William Rhodes be defendant at law.

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And that in the fourth of such issues the said William Rhodes be Plaintiff at law, and the said Richard Benyon de Beauvoir be Defendant at law. And that in the fifth of such issues the said Richard Benyon de Beauvoir be Plaintiff at law, and the said William Rhodes be Defendant at law. And the Defendants in such issues respectively are forthwith to name attornies, accept declarations, appear and plead to issue. And it is ordered, that it be referred to the Master of this Court, to whom these causes stand referred, to settle the said issues, in case the parties differ about the same. And it is ordered, that the documentary evidence which was read at the hearing of these causes may be read at the trial or trials of such issues without proof, and no objection to the admissibility of any part thereof is to be allowed. And it is ordered, that each party do produce such of the documents read at the hearing of these causes as are in his possession, and shall be required by the other party to be produced. And if the jury shall find any special matter, it is ordered that the same be endorsed on the *postea* or *posteas*. And it is ordered, that either party be at liberty to read the depositions of the late Defendants, Thomas Tebbutt the elder and Thomas Tebbutt the younger, both deceased, taken in the first-mentioned cause, and also the depositions of such of the other witnesses taken in these causes or either of them, on the trial or trials of such issue or issues, as shall be dead at the time of such trial or trials, or shall be proved to the satisfaction of the judge, at such trial or trials, to be in such a state of health as not to be capable of attending, saving all just objections to the admissibility of the depositions of such

other witnesses. And it is ordered, that the Defendant, John Tebbutt, be examined as a witness on such trial or trials; and in case the said Defendant, William Rhodes, shall read the depositions of the said late Defendants, Thomas Tebbutt the elder and Thomas Tebbutt the younger, or either of them, then it is ordered, that the said Defendant, John Tebbutt, be called and examined as a witness of the said Defendant, William Rhodes, unless the said last-named Defendant shall have called and examined the said Defendant, John Tebbutt, as a witness upon any of the said issues, which shall have been previously tried. And it is ordered; that all parties in these causes do produce before the said Master, upon oath, all deeds, papers, evidences, and writings, in their custody or power, relating to the matters in question; and either side is to be at liberty to inspect and take copies thereof at their own expense.

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The issue was tried in the Court of Exchequer, in Michaelmas term, 1834, before a special jury, who, after eight days' trial, found verdicts upon all the issues for Mr. de Beauvoir, the Plaintiff in equity and at law in the first issue.

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#### BAILEY v. WATKINS.

In D. P. 1826.

This was an appeal to the House of Lords against an order of the Court of Chancery, rescinding a former order of the same Court, by which the report of the Master, finding the Appellant the best bidder and purchaser of an estate sold under the decree of the Court had been confirmed. The question arose in a creditor's suit, in which the bill was filed by the Respondent for payment of the debts of a testator, who had devised and bequeathed to trustees his real and personal estates to be sold for the payment of his debts. A sale was directed under the decree and orders of the Court; and upon the sale,

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the Appellant, being the highest bidder for certain iron works, &c., was reported the purchaser and the report was confirmed absolutely. Six months after the order of confirmation, a discovery was made by two of the trustees for sale named by the testator, that the Appellant had, before the sale, entered into an agreement with Lewellyn, their co-trustee, who was the acting manager of the iron works, to admit him into partnership of the iron works in case the Appellant should become the purchaser; and, accordingly, after he was declared purchaser, he proposed to give Lewellyn one eighth of the profits of the concern as managing partner; but being afterwards doubtful of his capacity to manage it, or desirous of taking another partner, who paid a *bonus* or profit to the Appellant of 7000*l.*, he gave 1500*l.* to Lewellyn to relinquish his claim.

Upon a motion made on behalf of the two trustees, who were Defendants in the suit, and affidavits filed in proof of the facts above stated, the order confirming the purchase was rescinded.

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## ENGLAND.

(EXCHEQUER CHAMBER.)

DANIEL GILES, Esq. late	}	<i>Plaintiff in Error;</i>
Sheriff of the County of		
Herts' - - - -		
HARRY GROVER and JAMES	}	<i>Defendants in Error.</i>
POLLARD - - - -		

In pursuance of a commission and inquisition thereon, finding G. & P. indebted to the Crown, an extent issued on the 21st of August, 1816, to the sheriff of, &c. to inquire what debts G. and P. had in his bailiwick. By an inquisition thereupon, taken on the same day, it was found that F. and N. were indebted to G. and P. in 1480*l.*, for money lent, which debt the sheriff seized into the king's hands. On the same 21st day of August, a writ of *capias ad satisfaciendum* and extent was issued and delivered to the sheriff, whereby he was directed to inquire what lands, &c., and to appraise, extend, and seize the lands, goods, and chattels of F. and N. into the king's hands, until the debt should be satisfied.

Upon an inquisition before the sheriff, on the 21st of October, 1816, and taken under the before-mentioned writ, it was found that F. and N., on the day of issuing the writ, were possessed as of their own, &c. of divers goods and chattels within the bailiwick, *which were in the sheriff's custody at the time of issuing the writ*, by virtue of three writs of *feri facias*, for sums amounting together to 3727*l.*, and of an extent, tested the 22d day of July, 1816, for 3066*l.*, and of an extent in aid, tested the 27th of July, 1816, for 650*l.* The goods were thereupon seized by the sheriff into the king's hands, subject to the prior executions and extents.

Before the issuing of the extent of the 21st of August, three several writs of *feri facias*, at the suit of several creditors, had issued against F. and N., endorsed respectively for 351*l.*, 376*l.*, and 3000*l.*, under which writs the sheriff, in the month of July, 1816, had seized and taken in execution the same goods and chattels as were seized under the extent of August



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1816, of sufficient value to satisfy the several sums indorsed on the three writs of *feri facias*.

All the other writs of extent were posterior in date and seizure of goods to the writs of *feri facias*.

The goods seized under the extent dated in August 1816, were afterwards sold by the sheriff, and the proceeds not being sufficient to satisfy the writs of *feri facias*, the extent dated in July, and also the extent dated in August, the sheriff applied the proceeds of the sale of the goods in part satisfaction of the writs of *feri facias* and of the extent of July.

These facts being found upon a feigned issue directed by the Court of Exchequer, judgment was given for the Crown, and affirmed upon writ of error; in effect deciding, that where a subject obtains judgment in an action, and thereupon a writ of *feri facias* issues, which is delivered to the sheriff, who, in execution thereof, seizes the goods of the Defendant, if, while the goods remain in the hands of the sheriff, and before he has sold them, a writ of extent in aid is issued against the same Defendant, as debtor of a debtor of the Crown, tested after the seizure under the *feri facias*, and is delivered to the sheriff, the writ of extent, whether it be in chief or in aid, shall be executed upon the goods seized under the *feri facias*.

THIS case arose upon a special verdict, which was found upon the trial of a feigned\* issue directed by the Court of Exchequer in Hilary term

\* The origin of the feigned issue was as follows. In the year 1817, the Attorney-General filed an information in the Exchequer, against the Plaintiff in error, in the nature of an action for a false return to the writ of extent of the 21st of August. The Plaintiff in error pleaded the general issue; and the jury to try the same, returned a special verdict upon the record, substantially the same as the special verdict set forth in the text. On the 10th of May, 1820, the case was argued upon the direct question raised by the facts, — Whether the extent at the suit of the Crown, tested after the subject's judgment, and after the seizure by the sheriff under the writs of *feri facias*, was, under the circumstances stated in the special verdict, entitled to such a preference as to defeat all that had

1824, to be tried between the above parties, and originated in certain proceedings upon a writ of extent, then depending in the Court.

The declaration recited in substance, that before and at the time of issuing the extent, tested the 21st of August, 1816, Harry Grover and James Pollard were indebted to the King in the sum of 1480*l.* 6*s.* 9*d.*, being the king's money, arising from assessed taxes and property tax, collected and received by H. Grover and J. Pollard, as bankers appointed by the receiver-general of taxes for the county of Hertford, as by a commission, &c. appeared: that at the time of issuing the extent, H. Fourdrinier and T. Nicholls were indebted to H. Grover and J. Pollard in the sum of 1363*l.* 5*s.* 1*d.* for money lent; which last-mentioned debt had been seized into the king's hands by a certain extent and inquisition previously

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been done on the part of the judgment creditor by himself, and the sheriff for the recovery of the debt awarded by the judgment, under the writs of *feri facias*, upon which the sheriff had actually received the Defendants' goods.

The Court took time to deliberate for giving their judgment, and afterwards, on the 8th of July, 1820, judgment was given for the Crown. It should be noticed, however, that two only of the Judges of the Exchequer, viz. Baron Graham and Baron Garrow, expressed an opinion in favour of the Crown.—Baron Wood differed from these two learned Judges, and expressed a clear opinion in favour of the Plaintiff in error. The Lord Chief Baron Richards gave his judgment only *pro forma*, for the Crown, that the question might be further discussed, and decided in a court above.

A writ of error was then brought in the Exchequer Chamber, and after two arguments in that court, before the Chief Justices of the Courts of K. B. and C. P., their judgment being, that under the circumstances an information would not lie for a false return, as it was true in fact, though false in law; a feigned issue was recommended, and adopted to try the material point in issue.

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issued. The declaration then recited, that an extent had issued on the 21st day of August, 1816, against H. Fourdrinier and T. Nicholls for the debt, which was duly delivered to the Plaintiff in error, then being sheriff of the county of Hertford, to be by him duly executed; and thereupon a question arose between the Defendants in error and the Plaintiff in error — Whether at the time of issuing the last-mentioned extent, there were any goods and chattels of H. Fourdrinier and T. Nicholls, or either of them, which were liable to seizure under the extent, and afterwards to be sold for the purpose of satisfying the said debt of the Crown.

The declaration then stated, that the Defendants in error asserted, that there were such goods and chattels; and the Plaintiff in error, that there were not; and that in consideration that the Defendants in error had paid 5*l.* to the Plaintiff in error, he promised to pay them 10*l.*, if at the time of issuing the extent there were any such goods and chattels.

The declaration then averred, that there were such goods and chattels, and stated a breach of the promise.

The Plaintiff in error pleaded to the declaration, that there were not any such goods and chattels; upon which issue was joined. The cause came on for trial at the sittings in Trinity term 1824, when the jury found a special verdict, in which the facts were stated in substance as follows:—

That in pursuance of a commission, to inquire whether H. Grover and J. Pollard were indebted to the late king, and an inquisition thereupon finding them to be so indebted in the sum of 1480*l.* 6*s.* 9*d.*, an extent issued on the 21st day of August, in the year of our Lord 1816, to the sheriff of Middlesex,

to inquire what debts H. Grover and J. Pollard had in the sheriff's bailiwick. That by another inquisition taken on the 21st day of August, before the sheriff of Middlesex, it was found that H. Fourdrinier and T. Nicholls were indebted to H. Grover and J. Pollard in 1368*l.* 5*s.* 1*d.* for money lent ; which last-mentioned debt the sheriff of Middlesex had then seized into the king's hands. That on the 21st day of August, a writ of *non omittas capias ad satisfaciendum* and extent, tested on the same day, issued to the sheriff of Hertfordshire against H. Fourdrinier and T. Nicholls ; whereby the sheriff was ordered to inquire what lands, and goods, and chattels, H. Fourdrinier and T. Nicholls, or either of them, then had ; and the sheriff was thereby ordered to appraise and extend the same, and seize them into the king's hands, till the debt was satisfied. That this last-mentioned writ was duly delivered to the sheriff of Hertfordshire, the Plaintiff in error, on the 21st day of August.

That before the return of the last-mentioned writ, to wit, on the 21st day of October, in the year aforesaid, by an inquisition held before the said sheriff, and taken by virtue of the said last-mentioned writ, it was found, that the said Henry Fourdrinier and Thomas Nicholls were, on the day of issuing the same writ, possessed as of their own proper goods and chattels, of divers goods and chattels within the said sheriff's bailiwick, which were in the said sheriff's custody at the time of issuing the same writ, by virtue of three writs of *fieri facias*, for sums amounting together to 372*l.* ; and of an extent tested the 22d day of July, then last, for 3066*l.* 1*s.* 9*d.* ; and of an extent in aid of one Richard Weedon, tested the 27th day of the

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said month of July, for 650*l.*; all which said goods and chattels, subject to such prior executions and extents, as far as the same were available in law, in preference to the said extent of the date of the said 21st day of August, the said sheriff had taken and seized into his said Majesty's hands. That the said goods and chattels were at the time of their seizure of larger value than the sums of money directed to be levied by the two extents, tested prior to the said extent of the 21st day of August. That the said sheriff (the Plaintiff in error), at the return of the extent of the 21st day of August, returned accordingly to the Court of Exchequer, that he had seized the said goods and chattels, subject to such prior executions and extents, into the hands of his said late Majesty, as by the said extent of the 21st day of August he was commanded.

The special verdict then found, that before the issuing and teste of the said extent, tested the said 21st day of August, a writ of *feri facias*, tested the 3d day of July, in the same year, had issued against the said Henry Fourdrinier, at the suit of one Robert Gatty, and which (duly indorsed to levy 351*l.*) was, on the 8th day of July, 1816, delivered to the said Plaintiff in error, as sheriff of Hertfordshire, to be executed; and that he, on that same 8th day of July, seized and took in execution divers goods and chattels of the said Henry Fourdrinier, being part of the goods and chattels mentioned in the inquisition, taken on the extent of the 21st day of August, and of sufficient value to satisfy the sum so indorsed.

It then found, that before the issuing and teste of the said extent of the 21st day of August, another writ of *feri facias*, tested the 7th day of July;

in the same year, had issued against the said Henry Fourdrinier, at the suit of one Luder Hoffman; and which (duly indorsed to levy 376*l.*) was delivered to the said Plaintiff in error, as sheriff as aforesaid, on the 8th day of the said month of July, to be executed, and that he, on that same 8th day of July, seized and took in execution divers goods and chattels of the said Henry Fourdrinier, being part of the goods and chattels mentioned in the inquisition, taken on the said extent of the 21st day of August, and of sufficient value to satisfy the sum so as last aforesaid indorsed.

It then found, that before the issuing and teste of the said extent of the 21st day of August, another writ of *fieri facias*, tested on the 3d day of the said month of July, had issued against the said Henry Fourdrinier and Thomas Nicholls, at the suit of one Frances Maria Rachel Rougemont, and which (duly indorsed to levy 3000*l.*) was delivered to the said Plaintiff in error, as sheriff as aforesaid, on the 21st day of the said month of July; and that he, on the 22d day of the said month of July, seized and took in execution divers goods and chattels of the said Henry Fourdrinier and Thomas Nicholls, being the same goods and chattels mentioned in the said last-mentioned inquisition, and of sufficient value to satisfy the sum so as last aforesaid indorsed.

It was then found by the special verdict, that before the issuing of the said extent of the 21st day of August, another writ of *non omittas capias ad satisfaciendum*, and extent, bearing teste the 22d day of July, in the year aforesaid, (and grounded upon a previous inquisition holden by

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virtue of a commission in the usual form, by which inquisition it had been found, that the said Henry Fourdrinier and Thomas Nicholls were indebted to his said late Majesty in the sum of 3066*l.* 1*s.* 9*d.* for duties on paper,) had issued, directed to the said sheriff of Hertfordshire, against the said Henry Fourdrinier and Thomas Nicholls, and was delivered to the said Plaintiff in error, as such sheriff, on the 25th day of the said month of July; and that, under an inquisition, held before the said Plaintiff in error, as such sheriff, it was found, that the said Henry Fourdrinier and Thomas Nicholls were possessed of divers goods and chattels, which were seized by him into the said king's hands, under the said last-mentioned extent, subject to the said writs of *feri facias*, and were the same goods and chattels as are mentioned in the inquisition taken on the said extent, tested the 21st day of August aforesaid.

The special verdict then found, that before the issuing of the said extent of the 21st day of August, another writ of extent, bearing teste the 27th day of July, in the same year, (reciting, that it had been found by an inquisition, held by virtue of a commission, that Richard Weedon was indebted to his said late Majesty in 650*l.* for duties of excise; and also reciting, that by another inquisition, tested on the said 27th day of July, the said Henry Fourdrinier and Thomas Nicholls were found indebted to the said Richard Weedon in 650*l.* for work and labour, which debt had been seized into his said Majesty's hands,) issued to the sheriff of Hertfordshire against the said Henry Fourdrinier and Thomas Nicholls, and was delivered to the said Plaintiff in error, as such sheriff, on the 30th

day of the said month of July ; and that under an inquisition, held by the said Plaintiff in error, as such sheriff, it was found that the said Henry Fourdrinier and Thomas Nicholls were possessed of divers goods and chattels, which were seized by him into the said king's hands, under the said last-mentioned extent, subject to the said several writs of *fiери facias* and the said extent, bearing teste the said 22d day of July, and were the same goods and chattels as are mentioned in the inquisition taken on the said extent, tested the 21st day of August.

It was then found by the special verdict, that the said Plaintiff in error, after making the said return to the said extent, tested on the said 21st day of August in the year aforesaid, that is to say, on the 31st day of March, 1817, sold all the goods and chattels specified in the inquisition taken thereon, for a sum not sufficient to satisfy the said writs of *fiери facias* and the said extents, tested the 22d and 27th days of July aforesaid, but more than sufficient to satisfy the said last-mentioned writs of extent, and paid the proceeds arising from such sale in part satisfaction of the same writs of *fiери facias*, and the said extent of the 22d day of July aforesaid ; and that he did not pay any part in satisfaction of the said writ of extent, tested the 21st day of August, 1816, the whole having been paid and applied by him in part satisfaction of the monies due on the said several writs of *fiери facias*, and the said extent of the 22d day of July.

The special verdict then stated, in the usual form, that the jury upon the whole matter were ignorant whether there were at the time of issuing the extent of the 21st day of August aforesaid, any goods and chattels of the said Henry Fourdrinier

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and Thomas Nicholls, or either of them, liable to seizure under the same extent, and afterwards to be sold, for the purpose of satisfying the debt of the Crown mentioned in the same writ of extent; and prayed the advice of the Court in the usual way upon that point.—Upon this special verdict, judgment was given by the Court of Exchequer for the Plaintiffs below, the now Defendant in error, in Michaelmas term 1824.

In Hilary term 1825, the Defendant below, the now Plaintiff in error, sued out a writ of error returnable in the Council Chamber, nigh the said Exchequer.

The common errors were there assigned, and the Defendants in error joined in error, and in Hilary term 1827, the judgment of the Court of Exchequer was affirmed.

The Plaintiff in error afterwards brought a second writ of error, returnable in Parliament, upon which the common errors were assigned, and the Defendants in error joined in error.

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The case was argued before the House, in July 1831, the Judges being in attendance.

For the Plaintiffs in error, *Mr. J. Campbell* and *Mr. Follett*.

For the Defendants in error, *Mr. F. Pollock* and *Sir W. Owen*.

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At the conclusion of the argument, the following questions were put to the Judges:—

1. A common person brings his action against another, and obtains judgment, issues a writ of *feri facias* upon that judgment, and delivers the writ to the sheriff, who in execution thereof seizes

the goods of the Defendant. While the goods remain in the sheriff's hands, and before he has sold them, a writ of extent in aid is issued against the same Defendant, as debtor of a debtor of the Crown, tested after the seizure under the *feri facias*, and is delivered to the said sheriff.

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Shall this writ of extent be executed by the sheriff extending the same goods, seizing them into the king's hands, and selling them to satisfy the Crown's debt, without regard to the writ of *feri facias* under which he had first seized them?

2. All other things remaining the same, does it make any difference whether the writ of extent was in chief or in aid?

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The Judges delivered their opinions as follows, and in the following order:—

*Patteson J.*—In this case your Lordships have propounded two questions for the opinions of the Judges. 1. A common person brings his action against another, and obtains judgment, issues a writ of *feri facias* upon that judgment, and delivers the writ to the sheriff, who in execution thereof seizes the goods of the Defendant. While the goods remain in the sheriff's hands, and before he has sold them, a writ of extent in aid is issued against the same Defendant, as debtor of a debtor of the Crown, tested after the seizure under the *feri facias*, and is delivered to the said sheriff.

Shall this writ of extent be executed by the sheriff by extending the same goods, seizing them into the king's hands, and selling them to satisfy the Crown's debt, without regard to the writ of *feri facias* under which he had first seized them?

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2. All other things remaining the same, does it make any difference whether the writ of extent was in chief or in aid?

Upon the first question much difference of opinion has long existed, and there are conflicting decisions of the Courts of Law. Your Lordships, therefore, will not be surprised to find that the Judges have not been able to agree, and it has become my duty to state my opinion upon it.

I apprehend that the answer to this question depends upon two points: First, Whether the property in the goods is so altered by the seizure of the sheriff under the *feri facias*, that the extent cannot take effect? and secondly, Whether the statute 33 H. 8. c. 39. s. 74. bars the right of the Crown?

As to the first point. At common law, the goods of the debtor were bound from the teste of a writ of *feri facias* at the suit of a common person, as well as from the teste of the king's writ. This, as to common persons, is altered by the statute, 29 Car. 2. c. 3. s. 16., since which they are bound only from the delivery of the writ of *feri facias* to the sheriff. The Crown, however, not being named in that statute, goods are still bound from the teste of the king's writ. But this binding, in the case both of the king and of a common person, relates only to the debtor himself and his acts, so as to vacate any intermediate assignment made by him otherwise than in market overt; (3 Lev. 191. *Philips v. Thomson*, per Lord Hardwicke, 2 Equ. Cas. Abr. 381. *Lowthall v. Tomkins*, per Lord Ellenborough; 4 East, 538. *Payne v. Drewe*, and many other cases.) And even when made in market overt in the case of the king, it in no way affects the priority of conflicting writs. The rule

as to priority between common persons always was, that the writ which was first delivered to the sheriff should be first executed, without regard to the teste; but between the king and a subject, that the king's writ, though delivered last, should be preferred, on the ground expressed by Lord Coke, (9 Rep. 129<sup>b</sup>., *Quick's case*.) "*Quando jus domini regis et subditi insimul concurrunt, jus regis præferri debet*;" and this also without regard to the teste. If, therefore, a writ of *fieri facias* at the suit of a common person be delivered to the sheriff, and before any seizure made by him under that writ, a writ of extent at the suit of the king, tested after the delivery of the *fieri facias*, be delivered to him, it is not doubted but that the sheriff would be bound to execute the writ of extent in preference to the *fieri facias*. In the case, indeed, stated by your Lordships, the sheriff had already seized under the writ of *fieri facias*, before the writ of extent was delivered to him. What, then, was the effect of that seizure? If by it the writ of *fieri facias* is executed—if the rights of the king and of the subject no longer run together—if the property in the goods be taken out of the debtor—then the writ of extent is too late; it has nothing on which to operate. But if the seizure of the goods be but an inception of the execution—if the rights of the king and the subject are still conflicting—if the general property in the goods still remain in the debtor—then the maxim will still apply, and the king's right must be preferred.

It is not pretended in any of the authorities, except in some supposed loose *dicta*, that by seizure of the goods, any property therein is acquired by the creditor. So far is this from being the case;

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that where goods were seized by the sheriff under one writ (which had been last delivered), it was held, that he might sell under the writ of another creditor which had been first delivered, but under which he had not seized; 1 T. R. 729., *Hutchinson v. Johnston*; and see 7 Taunt. 56., *Jones v. Atherton*. Now, if the seizure under a writ of *fieri facias* executed the writ, if it changed the property, and vested it in the creditor, how came it that the sheriff, having seized under the second writ, was not compelled to sell under that writ? It cannot be said, that the reason was because the property was bound and altered by the delivery of the first writ, and therefore the goods could not be taken under the last, since it was held, in 4 East, 532., *Payne v. Drew*, that if the sheriff sell under the writ last delivered, the creditor whose writ was first delivered cannot follow the goods or their proceeds, though he has his remedy against the sheriff. And the same point had long before been determined in *Smallcomb v. Cross*, 1 Lord Raym. 251. 1 Salk. 320., and other places. It seems to me to be clear from these cases, that the seizure of goods by the sheriff will not make any difference as to the rights of creditors under conflicting writs, any more than the teste of the writs does, and will not vest any property whatever in the creditor under whose writ the seizure is made in the cases of common persons; why, then, should it make any difference in the case of the Crown and a subject? It is true, that in the report of the case of *Wilbraham v. Snow*, 1 Lev. 288., Lord C. J. Kelynge is made to say, that "the property is "altered from the owner, and given to the party "at whose suit;" but the reporter adds a *quære*,

and the other reports of the same case do not mention this supposed *dictum*. Again, in one report of *Clerk v. Withers*, 2 Lord Raym. 1075., Gould J. is made to refer to this supposed *dictum* of Lord C. J. Kelynge; but in another report of the same case, 6 Mod. 293., Gould J. is made to say only that Lord C. J. Kelynge held, in *Wilbraham v. Snow*, that the sheriff gained a general property by seizure, whereas the other Judges held that he gained a special property only; and Powys J. is made to say that the general property remained, perhaps, in abeyance: all which shows only the inaccuracy of the reporters, or the doubtful grounds of the decision; and as a special property in the sheriff is quite sufficient ground to warrant the decision, no other ground beyond that can reasonably be taken to have been established.

That the general property in goods, even after seizure, remains in the debtor, is clear from this,—that the debtor may, after seizure, by payment suspend the sale, and stay the execution (2 Show. 87., *The King v. Bird*), and have back his goods without any bill of sale or assignment, from the sheriff or creditor. And again, that if the sheriff, after selling a sufficient quantity of the goods seized to satisfy the debt, proceed to sell more, trover will lie against him at the suit of the debtor; but if the property, by seizure, is taken out of the debtor, it must be so taken as to all the goods seized; and what has operated to restore it? Still it is said, that, by the seizure, a special property vests in the sheriff, and that this is an alteration of property sufficient to protect the rights of the execution creditor, and to prevent the Crown from taking otherwise than subject to those rights.

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act of bankruptcy; which would be in conformity to the principle of the subsequent section 11., as to goods in the possession of the bankrupt by consent of the true owner. Besides, the goods when seized are the goods of the debtor; and if the effect of the seizure would be done away with by a subsequent act of bankruptcy, it would enable the debtor, by his own act, to defeat the creditor: the Courts, therefore, have construed the words in that act as applying to a seizure, and not to a sale. At all events, whether this conjecture be right or wrong, the decisions amount only to a construction of words in a particular act of parliament, with reference to the scope and object of the act, and cannot affect the general law; and it is also to be remembered, that the Crown is not mentioned in or bound by that act. The case of *Clerk v. Withers*, 2 Lord Raym. 1075., and other places, is also pressed, as establishing the doctrine, that the property is taken out of the debtor by the Sheriff's seizure; but no such doctrine is there laid down. The facts of the case were shortly these:—An administrator recovered a judgment by default against Clerk; he sued out a *fieri facias*, and Withers, the then sheriff, seized Clerk's goods. Before sale, the administrator died; then Clerk sued Withers (who had gone out of office in the mean time) to have restitution of his goods, contending, that as the plaintiff was an administrator, his executor or administrator could not have the benefit of the judgment, and that any new administrator *de bonis non* could not, because the judgment was by default. Another point was raised, which is not material here, as to Withers having quitted office. After much argument, it was held

that the action would not lie, because Clerk was discharged from the debt by the seizure of the Sheriff *ad valentiam*; and that the Sheriff having seized in the lifetime of the plaintiff must account to his representative. All this is perfectly consistent with the position, that the general property in the goods, even after seizure, remained in Clerk, and establishes only that the debtor himself cannot defeat an execution once begun, nor get back his goods after seizure under a *feri facias*, without payment of the debt.

It is urged, also, that when goods are once seized under a *feri facias*, the Sheriff must go on to perfect the execution, and that even a writ of error will not operate as a *supersedeas*. The cases to establish this position are somewhat confused; but admitting it to be established, the doctrine of change of property does not follow, for the bringing the writ of error is here also the act of the debtor himself.

For these reasons, and on the authority of the cases I have mentioned, and some others to which I must refer hereafter, I conceive that the property in the goods is not so altered by the seizure of the Sheriff under the *feri facias* as that the extent cannot take effect.

I come now to consider what is the effect of the statute 33 H. 8. c. 39. s. 74.

Premising that it appears to me somewhat doubtful, whether that section applies to any writ of extent issued in the first instance, commonly called an immediate writ of extent, and whether it was not intended to apply only to the King's writs of execution, after judgment or award of execution obtained by him in a suit, I am of opinion, that if

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it does apply to such an extent as the present, it does not, under the circumstances stated, prevent its priority. That statute created certain new courts, and it must be admitted that it gave the King some new rights; for the 50th section gives to bonds made to the King the effect of statutes staple, and the 53d section gives the King the same remedy on those bonds as the subject had on statutes staple. Then, after various other matters, comes the 74th section at a great distance, and it is this: "That if any suit be commenced  
 " or taken, or any process be hereafter awarded for  
 " the King, for the recovery of any of the King's  
 " debts, that then the same suit or process shall  
 " be preferred before the suit of any person or  
 " persons; and that our Sovereign Lord the King,  
 " his heirs and successors, shall have first execution  
 " against any defendant or defendants, of and for  
 " his said debts, before any other person or per-  
 " sons, so always that the King's said suit be taken  
 " or commenced, or process awarded, for the said  
 " debt at the suit of our said Sovereign Lord the  
 " King, his heirs or successors, before judgment  
 " given for the said other person or persons."

Now, in order to arrive at the true meaning of this clause, I think we must look at the state of the law before and at the time of the passing of the act. At common law, the King might, by his writ of protection, prevent any subject from suing his debtor at all, until the King's debt was satisfied; Co. Litt. 131. a. By statute 25 Edw. 3. c. 19., it was provided, that notwithstanding such writs of protection the subject creditor might sue the debtor to judgment, but not have execution till the King's debt was satisfied; and if the cre-

ditor would undertake for the King's debt, he should then have execution both for it and his own. Such writs of protection have long since ceased; and Lord Coke says that he cannot say any thing of them from his own experience, but there is no doubt that they were in use at the time of the passing 33 H. 8. That act having, by the 50th section, made bond debts to the King binding on the land of the debtor from the date of the bond, which they were not before, the 74th section seems to have been inserted for the benefit of the subject, primarily with a view to land, and so as to prevent the King's bonds from binding the land as against the judgment of a subject, which also bound the land, unless the King, by putting his bond in force before such judgment obtained, had expressed his intention so to bind the land. But the 74th section was also inserted, as it seems to me, with reference to the very prerogative of the King, of preventing the execution of the subject, and so having first execution himself, restricted as it was by 25 Edw. 3. c. 19. And in this view it applies to all proceedings for recovery of the King's debts, and to executions against goods as well as lands; and it abridges the power of the Crown, as it has been considered to do, in *The Attorney-General v. Andrew*, Hard. 23., and in 7 Rep. 18. b., *Cecil's Case*, and other cases. For since the 33 H. 8. the Crown cannot interpose and prevent the subject's execution, when he has obtained judgment before the Crown process is awarded; but in that case the subject may sue out his execution, and reap the fruits of it, if he can sell before the King's execution comes into the Sheriff's hands. By obtaining a judgment

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before the Crown process is awarded, the subject entitles himself to run a race with the Crown, so to speak, which he could not do before the statute 33 H. 8. ; nor, as I apprehend, can do even now, where he has not so obtained judgment. Although in all cases, according to *The Attorney-General v. Fort*, reported in a note to *The King v. Giles*, 8 Price, 364., if the Crown suffers the goods to be sold under a *feri facias* before it interposes, its process is too late, whether sued out before or after judgment obtained by the subject. The statute 33 H. 8. only, as I humbly conceive, enables the subject to run a race with the Crown in certain cases, but it leaves the issue of that race to depend on the common law maxim which I stated long ago, "*Quando jus domini regis et subditi insimul concurrunt jus regis præferri debet*;" which maxim is not denied, and is established by numerous cases. Otherwise, if the words of the 74th section are to be taken in their literal sense, this absurd consequence, among others, would follow,—that if a subject obtained a judgment, but did not take out execution for six months, another subject might in the interim commence a suit, proceed to judgment, take out a *feri facias*, and deliver it to the Sheriff, and so obtain priority, but that the Crown could not; or as it is well put in the argument, in *Rocke v. Dayrell*, 4 T. R. 406., if A. recover judgment against the King's debtor on the 1st of January, but do not deliver his writ of execution till the 4th, and B. also recover judgment against the same person on the 3d, and deliver his writ on the same day, and on the 2d an extent issues at the suit of the Crown, and is delivered to the Sheriff, according to the construction con-

tended for, this absurdity would follow, — that the King would not be preferred as against A., though he would as against B.; and yet it must be admitted that B. is entitled to a preference against A. The literal meaning of the words of this section cannot therefore be adopted; nor am I able to see any construction that can reasonably be put upon the statute, other than that which I have imperfectly expressed, but which will be found infinitely better stated in Mr. Baron Graham's judgment in this very case, 8 Price, 362., and in Lord Chief Baron Macdonald's judgment in *The King v. Wells and Allnutt*, reported in a note to *Thurston v. Mills*, 16 East, 278.

Mr. West says, in his book on Extents, p. 108., that the statute 33 H. 8. gave the Crown a new kind of execution for all its debts, a species, too, of execution which, before the statute, was the subject's, and the subject's only. This he deduces from the 50th and 53d sections of that act. I think that he is wrong in that view of the statute, and that the proceeding by extent in the first instance, at the suit of the Crown, existed long before the statute 33 H. 8., and was only modified and restricted by that act. But whether he be right or wrong is not, in my humble opinion, material; for even if he be right, I still hold that the true construction of the statute is that which I have already expressed.

I will now proceed to consider some of the cases in which this question has arisen, or been discussed.

And, first, the case of *Uppom v. Sumner*, 2 Bl. 1251. and 1294. In that case the Sheriff, on the 18th of April, seized one Caun's goods under a

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*feri facias*, at the suit of Uppom the plaintiff, returnable on the 12th of May. On the 24th of April, before sale, an extent was sued out and delivered to the Sheriff. The Sheriff sold under the extent, and returned *nulla bona* to the *feri facias*; upon which Uppom brought his action for a false return. A verdict was taken for the plaintiff, subject to the opinion of the Court of Common Pleas on a case. The plaintiff's counsel at first admitted that they could not support their case, and the verdict was set aside; but afterwards, on their application, the Court let them in to argue it. It was argued by Serjeant Walker for the plaintiff, who put the case on the statute 33 H. 8. c. 39. The judgment was given by Gould J., in Easter term, 9 Geo. 3., delivering the opinion of Lord Chief Justice De Grey, himself, Nares, and Blackstone Js. He grounds his judgment, first, on the statute 33 H. 8., as to which I have already spoken; and, secondly, on authorities which I will proceed to examine. He first distinguishes *Stringfellow's Case*, Dyer, 67. b., as not having arisen on a judgment, but on a statute staple, and therefore not being within the provisions of 33 H. 8., and then relies on the cases of *Lechmere v. Thorowgood*, 3 Mod. 236., and other places; and *The Attorney-General v. Andrew*, Hard. 23.; and on a passage in Lord Chief Baron Comyns's Digest, tit. Debt, G. 8., who, after citing 33 H. 8., says, "Therefore if execution be upon a judgment against the King's debtor, and before a *venditioni exponas* an extent comes at the King's suit, those goods cannot be taken upon the extent;" and cites for this position the two cases just above mentioned. And Gould J. also

mentions the case of *the King v. Dickenson*, Parker, 262. That was a question as to administration of assets, in which the point decided was, that a judgment creditor of the deceased should be preferred to a simple contract creditor, who, being a debtor to the Crown, had, after the death of the deceased, procured an extent in aid, — a case wholly foreign to the question in *Uppom v. Sumner*. The authorities, therefore, on which Lord Chief Baron Comyns and Gould J. rely are reduced to the two before mentioned, *Lechmere v. Thorowgood* and *The Attorney General v. Andrew*. Gould J. says, that the former of these cases is obscure, arising from its being reported piecemeal, and in different books, and recommends reading them in order of time as they occur; viz. the pleadings, 2 Jac. 2. 2 Ventr. 159.; the first argument, 4 Jac. 2. 3 Mod. 236.; the second argument and judgment, 1 W. & M. Comb. 123. 1 Show. 12.; and a subsequent action between the same parties in effect, in the Common Pleas, in *Lechmere v. Toplady*, 2 Ventr. 169. 1 Show. 146. I have read them all in that order; and although there are some loose *dicta* and extra-judicial matters stated, yet it is easy to find out what points were really determined; and they were simply these: First, that in an action of trespass, by assignees of a bankrupt against a Sheriff, who had seized goods under a *fieri facias*, after a secret act of bankruptcy, the Sheriff could not be made a trespasser by relation: this was *Lechmere v. Thorowgood*; and, secondly, that in an action of trover for the same seizure, against the execution creditor, the judgment for the Sheriff, in the action of trespass, was a good bar by way of estoppel: that was *Lechmere v. Toplady*. I do not mean to

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say that I at all agree to the decision on the last point, but it was the point decided, and the only point. With respect to *Lechmere v. Thorowgood*, the facts were shortly these: The Sheriff seized goods of one Toplady, on the 29th of April, under a *fiery facias*, after a secret act of bankruptcy committed on the 28th of April; and whilst the goods remained in his hands unsold, viz. on the 4th of May, an extent at the suit of the Crown against Toplady was delivered to him. On the 5th of May a commission of bankruptcy issued against Toplady, under which the plaintiffs were appointed assignees, and sued the Sheriff in trespass. A special verdict was found, and it was held that the action would not lie. Some of the reports say, that it was held that the extent came too late; but this point could not have been determined; for the Crown was no party to the suit, and was not heard, therefore no right of the Crown could be decided in it. Again, the Crown and the execution creditor were on the same side, the Sheriff, the defendant, having seized for both; no point, therefore, as between them, could arise in the case, especially as the defendant succeeded; because it was held that the Sheriff could not be made a trespasser by relation. All the reporters agree in stating that to be the point decided; even Comberbach so states, although he makes Lord Chief Justice Holt say, "The property in goods " is vested by the delivery of the *fiery facias*, and " the extent afterwards for the King comes too " late; and this by the statute of frauds and " perjuries." This must be a mistake. It is contrary to Lord Holt's own position in *Smallcomb v. Cross*, 1 Lord Raym. 252.; it is wholly beside the

question before him, and makes him consider the statute of frauds as binding on the King, who is not named in it. Lord Mansfield, in *Cooper v. Chitty*, 1 Burr. 36., says, that Lord Holt could never say that the property in the goods vested by the delivery of the *feri facias*, and that the extent for the King afterwards came too late; and adds, "No inception of an execution can bar the Crown." And Lord Ellenborough also points out the inaccuracy of Comberbach very forcibly in 4 East, 539., *Payne v. Drewe*. With respect to the case of *The Attorney-General v. Andrew*, Hard. 23., it is quite apparent, from a perusal of that case, that the execution, which was by *elegit*, was perfected and completed by delivery of the lands, before the King's writ issued; and then, as Lord Chief Baron Steel says, "The subject's title is prior to the King's, and is executed." The same law and the same consequences have since been held to attach in *The Attorney-General v. Fort*, reported in a note to 8 Price, 364., and in *Swain v. Morland*, 1 Bro. & Bing. 370. The two cases cited do not therefore bear out the position of Lord Chief Baron Comyns, nor the decision in *Uppom v. Sumner*; and that decision must be supported, if at all, on the stat. 33 H. 8., on which I have already remarked.

The next case is *Rocke v. Dayrell*, 4 T. R. 402. That case was decided principally on the authority of *Uppom v. Sumner*, and the authorities there cited; and if they are shown to be wrong, the decision in *Rocke v. Dayrell* is wrong also. Lord Kenyon puts the case on the ground of change of property; for he says, "that as long as the property of the debtor remains unaltered, and an execution

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“ at the suit of a subject, and an extent at the  
 “ King’s suit issue against the debtor, the title of  
 “ the latter must prevail ; for the point to be con-  
 “ sidered in these cases is, In whom is the pro-  
 “ perty ? ” He adds, “ I have always understood  
 “ it to be clear and settled (and this question has  
 “ very frequently occurred in the Exchequer),  
 “ that if an extent at the suit of the Crown be  
 “ tested, prior to the time when the subject’s ex-  
 “ ecution is delivered to the Sheriff, the former  
 “ shall have the preference. But as by the com-  
 “ mon law, abridged as it is by the statute of  
 “ frauds, the property of the debtor’s goods is  
 “ bound by the delivery of the writ to the Sheriff,  
 “ there then remains no property in the debtor on  
 “ which the prerogative of the Crown can attach.”

Now, with all possible respect for every thing  
 which fell from Lord Kenyon, I humbly con-  
 ceive, that he has here confounded the binding  
 the property in goods, and the alteration of the  
 property ; and that he is mistaken in supposing  
 that the property in goods is or ever was at all  
 bound or altered either by the *teste* or delivery of  
 the writ, as regards conflicting writs, and that the  
 binding is only as regards the debtor himself, as I  
 have before shown ; and if so, the very foundation of  
 his judgment fails. The other Judges put the case  
 on the statute 33 H. 8. These are the only deci-  
 sions in favour of the subject’s execution ; for *Thurs-*  
*ton v. Mills*, 16 East, 2., went off on another point.

Against them are the uniform decisions of the  
 Court of Exchequer, one of which is reported  
 at length ; viz. *The King v. Wells and Alnutt*, in  
 the note to *Thurston v. Mills*, 16 East, 278. : this  
 is subsequent to both *Uppom v. Sumner* and *Rocke*

v. *Dayrell*, which are cited and relied on in argument. Now, without fully agreeing to every word that is said by Lord C. B. Macdonald, in giving the judgment of the Court, (some of whose positions, according to the letter, I confess, appear to me untenable,) I am perfectly satisfied with the general reasons given in that judgment. The same point was again discussed and decided in *The King v. Sloper and Allen*, 6 Price, 114., which is still later.

There are other prior cases to which I would briefly refer; and, first, *Stringfellow v. Brownsoppe*, Dyer, 67. b., which was decided in Michaelmas term, 3 Edw. 6., seven or eight years after 33 H. 8. In that case the sheriff seized Brownsoppe's goods under an *extendi facias* upon a statute staple, at the suit of Stringfellow; and before any writ of liberate, the King's writ of extent came into his hands, and the Court held that the King's writ should be preferred, because the property in the goods was not in Stringfellow, before they were delivered to him by writ of liberate. It is said that this is no authority to the present point, for that the *extendi facias* is in nature of a judgment, and the liberate is the execution; therefore, as a judgment operates no change of property, so neither does seizure into the King's hands under an *extendi facias*, but that as delivery under a liberate operates a change of property, so does seizure under a *feri facias*. Now, I cannot understand this reasoning at all. I can see that the award of an *extendi facias* may be, and is, analogous to a judgment; but how a seizure under it can be so I am at a loss to comprehend. Again, I can see how delivery under a liberate of the specific goods

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to the creditor, as is always done, may be and is analogous to sale under a *feri facias*, which directs the sheriff to make money of the goods; but how the mere seizure into the sheriff's hands, under a *feri facias*, should be analogous to delivery over to the creditor under a liberate, I am at a loss to comprehend. I apprehend, that seizure under an *extendi facias* is the inception of the execution, and so is seizure under a *feri facias*; delivery under a liberate is the completion, and so is sale under a *feri facias*; the only difference is, that a liberate must issue to enable the sheriff to deliver in the one case, whereas, in the other, he may and ought to sell without a *venditioni exponas*; but this difference cannot vary the effect of the seizure. The principle established in Stringfellow's case is, in the words of Lord Mansfield, that no inception of an execution can bar the Crown. Stringfellow's case was against the opinion of some of the profession at the time, but it has been recognised as good law many times since, and seems to me to be directly in point. Next comes *Carson's Case*, 3 Leon. 239. and 4 Leon. 10., which only shows that after delivery under a liberate the King's writ is too late.

In *The King v. Peck*, Banb. 8., it was taken for granted, that if an extent comes after seizure under a *feri facias*, and before sale, it shall be preferred.

In *The Attorney-General v. Capel*, 2 Show. 480., the point decided arose out of a bankruptcy, the King's writ being preferred after an act of bankruptcy, and before assignment by the commissioners. It is not in point to the present question; but at the end of the judgment are these words:—  
“Extents have been held good that have been

“made upon goods actually levied by virtue of a *“fieri facias*, and in the sheriff’s custody, the extent coming before a bill of sale made, so as the property was not altered.” Also, in 5 Mod. 376. *Smallcomb v. Buckingham*, which is the same case as is elsewhere called *Smallcomb v. Cross*, there is a *dictum* to the same effect, and many others in other places; all which *dicta* I merely notice, to put them in opposition to other *dicta* as to the vesting and alteration of property by seizure.

Lastly comes the case of *The King v. Cotton, Parker*, 112. That was the case of goods seized under a distress for rent; and it was held that they were still liable to be taken under an extent at the suit of the King, though in the custody of the law, and therefore privileged from being taken in execution by a subject. It is said that this case is not in point, because no property at all in the goods is gained by the distrainor, who can neither maintain trespass nor trover for them; and that such is the ground of the decision, inasmuch as it lay on the claimant in the Exchequer to prove property in himself against the Crown. Now, on looking at the whole of the elaborate judgment of Lord C. B. Parker in that case, I do not find that he puts the case on the form of the pleadings, but on the general principle that the property is not altered, and therefore the King has preference; and throughout his judgment he cites cases as to the effect of seizure under a *fieri facias* proceeding upon that principle. I consider, therefore, that this case is a strong authority upon principle, unless it can be shown that seizure by the sheriff alters the property; and I submit that the contrary has been shown. It is true, that neither

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*Stringfellow's Case* nor *The King v. Cotton* are direct authorities with regard to the statute 33 H. 8., because in neither of them had the subject obtained judgment.

Upon the whole, then, whether with reference to the statute 33 H. 8., or independent of it, the main points appear to me to be, was the property changed by the seizure? and were the King's writ and the subject's concurring? I say that the property was not changed, and that the writs were concurring.

My answer, therefore, to the first of your Lordships' questions is, that, in my opinion, the writ of extent shall be executed by the sheriff, by extending the same goods, seizing them into the King's hands, and selling them to satisfy the Crown's debt, without regard to the writ of *feri facias* under which he had first seized them.

With regard to the second question, I find it uniformly considered, that an extent in aid, when once it has issued, has all the force and all the incidents of an extent in chief, and therefore I am of opinion that, all things remaining the same, it does not make any difference, whether the writ of extent was in chief or in aid.

Lord Coke says, "As to the third protection, *cum clausulâ volumus*, the King, by his prerogative, regularly is to be preferred in payment of his duty or debt by his debtor, before any subject, although the King's debt or duty be the latter; and the reason hereof is for that *thesaurus regis est fundamentum belli et firmamentum pacis*. And thereupon the law gave the King remedy by writ of protection to protect his debtor, that he should not be sued or attached until he paid the King's debt."

*Alderson J.* — The first question proposed by your Lordships for our consideration is in substance this: Whether, when goods seized by a sheriff, under a writ of *feri facias*, remain in his hands unsold, a writ of immediate extent, tested after such seizure, does, upon its delivery to such sheriff, entitle the Crown to a priority of execution? and after fully considering that question, I have arrived at the conclusion, that it must be answered in the affirmative.

This subject has been for a long period *verata questio* in our Courts. And in order the more clearly to explain the grounds on which my opinion is founded, it will be useful to advert, in the outset, to the extent of the prerogative of the Crown as to its debts, and the principles on which that prerogative depends, and then to proceed to examine the authorities, and the reasons assigned for those determinations, which are to be found in our books on this point.

The prerogative of the Crown, as to its debts, is laid down in various books, and cannot, I apprehend, be doubted. Lord Coke, in *Herbert's Case*\*, states that, "by the common law, the body, land, and the goods of the accountant, or the King's debtor, were liable to the King's execution;" and he adds that there were "infinite precedents in the Exchequer" to prove this, antecedent to the 38 Hen. 8. c. 39. Lord C. B. Gilbert also, in his History of the Exchequer, lays it down, that the second summons of the pipe is "in the nature of a *levari facias* against the body, lands, and goods of the debtor." And in *Foster v.*

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*Jackson*\* the law is very clearly laid down thus :—  
 “ It is a prerogative to the King to have execution of  
 “ body, lands, and goods, not communicated to the  
 “ subject, but in case of statute merchant and statute  
 “ staple, and recognizance of that nature, which is  
 “ by the statute law ; and therefore the case put in  
 “ *Bloomfield’s Case*, that where the party was taken  
 “ in execution upon a statute and died, and yet exe-  
 “ cution was had against goods and lands after, is  
 “ nothing in this case ; for they were all due at the  
 “ first, and therefore may be taken at once or seve-  
 “ rally.” And in Maddox’s History of the Ex-  
 chequer, vol. ii. p. 183., and subsequent pages, a  
 great variety of instances, confirmatory of this pas-  
 sage of Lord Hobart in all its parts, will be found.

I have cited this passage from Lord Hobart at full  
 length, because I shall have occasion again to refer  
 to it, in considering the true construction which  
 ought to be put on the statute 33 Hen. 8., and be-  
 cause I think it will be found to afford a sufficient  
 clue to enable us to discover what was the real  
 change in the law produced by that statute, as to  
 the prerogative to the Crown.

It is necessary to cite other authorities on  
 this subject. The result of them all being, as I  
 conceive, that the King at common law, by his  
 prerogative, could either, by one writ or by suc-  
 cessive writs, as he might find it convenient, seize  
 the body, lands, and goods of his debtor ; and fur-  
 ther, that this was originally a prerogative peculiar  
 to the Crown, but afterwards extended to the sub-  
 ject, viz. as to the body of the debtor, by the sta-  
 tute of Marlebridge, c. 23., the statute Westm. 2.  
 c. 11., and the statute 25 Edw. 3. ; and to the

\* Hob. 60.

lands, by the statute Westm. 2. c. 18.; and in the cases of statute merchant and statute staple, and recognizance in nature of statute staple, by 13 Edw. 1., 27 Edw. 3., and 23 Hen. 8. c. 6., to the body, lands, and goods.

The next prerogative of the Crown, about which I apprehend there is no dispute, is, that where the right of the Crown and the subject concur, that of the Crown is to be preferred.\* A prerogative depending, first, on the principle that no laches is to be imputed to the King, who is supposed by our law to be so engrossed by public business as not to be able to take care of every private affair relating to his revenue (Gilb. Hist. Exchequer, 110.); and, secondly, on the ground, that by the King is in reality to be understood the nation at large, to whose interest that of any private individual ought to give way. In the quaint language of Lord Coke, "*Thesaurus regis est firmamentum pacis et fundamentum belli.*" And, until restrained by various enactments of the statute law, this prerogative extended to prevent the other creditors of the King's debtor from suing him, and the King's debtor from making any will of his personal effects, without special leave first obtained from the Crown. But without further adverting to this ancient state of the prerogative, it is clear that at this day the rule is, that if the two rights come in conflict, that of the Crown is to be preferred.

If, however, the right of the subject be complete and perfect before that of the King commences, it is manifest that the rule does not apply; for there is no point of time at which the two rights are in conflict; nor can there be a question which

\* 9 Rep. 129. b.

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of the two ought to prevail, in a case where one, that of the subject, has prevailed already. But if, whilst the right of the subject is still in progress towards completion, the right of the Crown arises, it seems to me, that the two rights do come into conflict together, at one and the same time; and that the consequence in that case is, that the right of the Crown ought to prevail. Lord Mansfield expresses this proposition in shorter language, when he says, "No inception of an execution can bar the Crown:" *Cooper v. Chitty*. \*

Now, if we proceed to apply these principles to the determination of the present case, it will appear that the material facts are these:—J. S. has obtained judgment against a Crown debtor, has issued a *fiery facias* upon that judgment, and has delivered the writ to the sheriff, and the sheriff, in execution thereof, has seized the goods of the Crown debtor; the question then is this, Is the right of the subject perfect at the time when the goods are seized by the sheriff? or is there any further act to be done, in order to make that right consummate?

The most simple criterion of this seems to be, whether, without any thing further being done, the execution creditor is entitled to call upon the sheriff for the possession of the goods, or to pay him the debt? Now, I do not believe that it was ever contended that the execution creditor is entitled to the possession of the goods themselves, unless under some contract made between the sheriff and him, which would be equivalent to a sale under the writ. Nor can he call upon the sheriff,

\* 1 Burr. 36.

even after a return of goods seized *ad valentiam*, to pay to him the debt for which the levy is made. If he could, it would be utterly useless to empower him to require the sheriffs afterwards to proceed to a sale by the writ of *venditioni exponas*. In fact, it is clear, that all he can do, even after such return, is to compel the sheriff to proceed to sale by ulterior process from the Courts. There are many authorities founded on this principle, which show that a seizure of goods *ad valentiam*, is only a temporary bar to the execution creditor, so long as the goods remain unsold in the sheriff's hands. Again, if the goods, after seizure, are destroyed by unavoidable accident, the loss falls upon the debtor. The principle is, that the sheriff is excused, where the execution fails altogether without his fault; and in that case, according to the doctrine laid down in *Foster v. Jackson*\*, by Lord Hobart, the creditor may have a fresh writ of *feri facias*, and the loss falls on the debtor. There is a third criterion, which is this: That the debtor, on tendering the amount for which the levy is made, and the sheriff's charges thereon, is entitled to have a return of the goods seized by the sheriff.

From these premises two propositions seem to me to follow: first, that at no period of time at all does the execution creditor obtain any property whatsoever in the goods themselves; and, secondly, that the general property in the goods seized remains, until the sale, in the debtor, and is not changed by the seizure: *Milton v. Eldrington*.† After sale the case is very different; for, by the sale, the property is wholly changed from the

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\* Hob. 60.

† Dyer, 98. b.

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debtor to the vendee of the sheriff, and the money, the produce of the goods, then becomes the property of the creditor, for which he may maintain an action for money had and received, and for which the sheriff is responsible to him, the original debtor being then wholly and finally discharged: *Perkinson v. Gilford*.<sup>\*</sup> The rule is thus expressly laid down by Mr. Baron Garrow, in delivering the opinion of the Court, after full consideration, in the case of *Higgins v. M'Adam*†:—“ The rule is, “ that when execution is executed, the property is “ changed; and execution is said to be executed “ when a sale has taken place.” It is not, therefore, till after the sale that the right of the execution creditor becomes consummate; and it will follow from thence, that it is not till after the sale that the right of the creditor ceases to concur with the right of the Crown. If, therefore, the right of the Crown arises at any period prior to the sale, it seems to me, that, on the principles above laid down, it ought to have the preference. A preference depending on similar grounds, and terminating at the same period, seems to me to be fully recognized by the Court of King's Bench in *Hutchinson v. Johnson*.‡ That was the case of two conflicting executions. The sheriff had seized under the writ last delivered to him; but, before sale, having discovered that another writ, which was entitled to priority, had been first delivered to him, he made sale under it, and paid the surplus only to the creditor under the second writ, under which he had seized; and the Court expressly decided, that, until sale he had a right so to do, but

\* Cro. Car. 539.

† 3 Younge & J. 1.

‡ 1 T. R. 729.

after sale, not: *Rybot v. Peckham*\* being an express authority to that effect. And it is observable, that many of the authorities which are relied on in the present case were then cited; in particular, the case of *Clerk v. Withers*.† And the very proposition now before your Lordships for decision, it is to be observed, was urged as clear law by the very eminent persons who argued that case, viz. that, till sale, the extent prevails over the prior execution. And I apprehend, that, prior to the statute of frauds, if a subject's writ of execution had come to the sheriff after seizure, but before sale, under a writ of a subsequent *teste*, the sheriff would have been, in like manner, justified in executing it before the other writ under which he had seized, and would have been liable to an action on the case, if he had omitted to do so. These authorities seem to me to show clearly, first, that no property passes, by the seizure, from the original debtor to the creditor; and, secondly, that even in the case of conflicting rights as between subject and subject, the point of time, which the Courts uniformly look at, the period when the execution is consummate, is not the seizure, but the sale under the writ.

There is one case, however, which requires some observation, as it would seem to trench upon this proposition: I allude to the construction put by the Courts upon the ninth section of the 21 Jac. 1. c. 19. There is no doubt that the Courts have held that the seizure under a writ of *fieri facias* was sufficient to satisfy the words "execution or "extent served and executed" contained in this

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\* 1 East, cited in Notes, 731.

† Salk. 322.

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statute, and that for the purpose of protecting the execution creditor from the effect of a prior act of bankruptcy. But this was a decision upon the construction of a particular statute, and must have reference, reasonably considered, to the peculiar objects of the legislature. It is to be observed, first, that it was prior to the statute of frauds; the law, therefore, then was, that writs of *fieri facias* bound the debtor's property (as to all persons claiming under him) from the *teste* of the writ, and not from its delivery to the sheriff; so that it was then possible for a party to sue out his writ of *fieri facias*, and to omit to execute it, and so give to the bankrupt the same species of delusive credit as was provided against by the 11th section, in cases where the bankrupt was the reputed owner of another's goods. It was probably, therefore, with that view that this clause was introduced, providing that such writs should not bind as against those who claimed under the bankrupt from their *teste*, but only from the date of the public act done by the sheriff, in seizing the goods under the writ. For this purpose, that of giving notice to the other creditors, the seizure and not the sale was the important period. The present case, however, depends on the question, whether the property is changed; and until sale this is not the case. The execution is not complete, so as to transfer the property, until that period.

But it is urged, and a great portion of the argument at the bar turned upon it, that although it may be that the execution creditor has no consummate right till after sale, and although the general property in the goods remains until sale with the debtor, yet that the sheriff has a special property

in him from the time of the seizure, and that the Crown, in the event of the *teste* of the extent being subsequent to the seizure, must take the goods subject to that special property.

There is no doubt that a variety of authorities may be cited, establishing as clear law, that the Crown must take, subject to a special property created by the act of the party. In the case of the factor, *Rex v. Lee*\*, it was held that goods in his hands, on which he had a lien, for his advances made before the *teste* of the extent, could only be taken by the Crown subject to that lien; so, again, in the case of goods pawned or pledged before the *teste* of the extent, *Rex v. Cotton*†, and in the case of *Rex v. Humphrey*‡, the same law prevailed. In *Ward v. Casberd*§, an equitable mortgage, created before the party creating it became a debtor to the Crown on record, was in like manner held to be valid against a subsequent extent. But I can find no instance whatever, nor do I believe that any such exists, where a special property, not created by contract between the Crown debtor and the person setting it up, as between the Crown debtor and some one under whom such person claims, has been ever allowed to prevail; and I think good reasons may be assigned for the difference. In the case of land, if the subject sell it before he became a Crown debtor, it is clear that the sale is good. Now, on principle, he who can make a valid sale ought to be allowed to make any contract short of that, which shall also be valid; he may, therefore, make a valid pledge. The right of the other party is consummate by the act of pledging or of sale; but the cases of a distress for

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\* 6 Price, 369.

† Parker, 112.

‡ 1 McClell. 19.

§ 6 Price, 411.

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rent before sale, a seizure by the messenger under a commission of bankrupt, and the case now in judgment, are very different. There the goods are all taken, by an adverse proceeding, from the Crown debtor, and are all under the custody of the law at the time when the extent is put in. The creditor's right is put in progress, and the sheriff, the commissioners of bankrupt, and the distrainer, are all officers of the law, holding the property, and having rights given to them for the purpose of protecting them in their possession, not for their own benefit, but for the purpose of disposing of it for the benefit of those who may ultimately be entitled to the proceeds of that property. The true description of the state of such property is, that it is in the custody of the law, whereas in the case of the factor, wharfinger, pawnee, or equitable mortgagee, it is in the custody of the party himself, having a beneficial interest under a valid contract. Lord C. B. Gilbert, speaking of lands, (and the principle is the same as applied to goods, although the charge takes effect at a different period,) says, "That nothing can hinder the King's charge but what amounts to a precedent; alienation and a liberate, in pursuance of a previous judgment, amounts to an alienation of the land; and yet, before the liberate, there is a seizure of the land by a public officer, for the purpose of its being by the liberate alienated to the creditor. By the seizure, the land is taken into the custody of the law; by the liberate, it is alienated to the creditor; and from the date of the latter the right of the owner is vested."

I am aware of the various cases and authorities which exist, in which it has been determined that

trover will lie by a sheriff, after seizure of goods under a *fieri facias*; and I do not dispute the proposition, that this shows that the sheriff has, for some purposes, a special property in the goods so seized. But it seems to me that this point is not really material. The special property which the sheriff or any other public officer has, is not a property beneficial to himself; it is a property conferred on him to enable him to discharge his public duty. The goods are in *custodia legis*, and the special property of the sheriff is given to him, that this *custodia legis* may be rendered safe. If, then, it be true, as many cases have determined, and in particular, *The King v. Cotton*\*, that goods in *custodia legis* are in a situation in which the Crown's right and that of the subject may come in conflict, I do not think that it really makes any difference, whether the officer having the custody has greater or less powers to defend it conferred on him by the law. The real question seems to me to be, whether the property has wholly or in part gone from the debtor to some person claiming adversely to the Crown, or whether it is only a progress to that result? The sheriff, or other public officer, holds it with more or less of powers given for its protection, but really for the person ultimately entitled to receive the proceeds. If that person be a subject having a prior writ delivered to the sheriff, the sheriff holds for him the proceeds of the goods seized under a subsequent writ, as in *Hutchinson v. Johnson*†; or if, as in the present case, the Crown's extent come in before sale, he holds for the Crown.

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\* Parker, 122.

† 1 T. R. 729.



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I have hitherto considered this as if it were *res integra*, but I shall now proceed to consider it upon authority merely. The leading case upon this subject is *Stringfellow's Case*\*; and the authority of that case, though doubted for a time, cannot now, I think, be disputed. It was recognized as good law by Lord Hobart in *Sheffield v. Ratcliffe*†; by Lord Rolle in his Abridgment; by Lord Hardwicke, and two Chief Justices, Ryder and Willes, in *Rex v. Cotton*‡; and by the Court of Common Pleas and King's Bench in *Uppom v. Summer*§; and *Rorke v. Dayrell*|| I do not think it necessary to add the various cases in the Exchequer on this point.

It is, however, contended that Stringfellow's case is distinguishable, and undoubtedly it is so, in its facts, from the present. The main ground of distinction is, that there remained in that case a further act to be done by the Court, viz. the award of the liberate; and it is said by Mr. Baron Wood, that the liberate and the *fieri facias* are equivalent to each other¶; but, I think, that proceeds on a mis-statement of the true point in the case. The right vested by the liberate in creditor, is to have the identical lands and the identical goods delivered to him. The creditor's right is, therefore, consummate by the liberate; but the *fieri facias* does not command the sheriff to seize and deliver the goods to the creditor (in which case the *fieri facias* and seizure would be equivalent to the liberate after the previous seizure), but in substance it commands him to seize and sell,

\* Dyer, 67.

† Parker, 118.

|| 4 T. R. 402.

† Hob. 339.

§ 2 Blacks. 1294.

¶ 8 Price, 318.

and to pay the money produced by the sale to the creditor. The act of sale, therefore, and not the act of seizure, puts the sheriff in the same situation with respect to the creditor as the liberate under an extent; for, by the act of the sale, the creditor has vested in him a consummate right to the produce of the sale. Now Stringfellow's case clearly decides, that, until the liberate, the lands and goods seized, and in the hands of the sheriff, remain liable to the Crown process. That case, therefore, appears to me, in principle, to have decided that, until the creditor obtains a consummate right, the Crown's rights are not ousted, and so to govern the present case. The case of *Rex v. Cotton* is a much stronger authority; it seems to me to be decisive of this question. Its authority, looking at the persons by whom it was decided, and those by whom that decision was affirmed, must be admitted to be of great weight. It is not a little singular to find, that, although the point now before your Lordships was there treated as the proposition and that case as the corollary, it should now be contended, that although *The King v. Cotton* is good law, still the proposition from which that case was in truth only a corollary, cannot be supported. The principle there laid down clearly was, that goods in *custodia legis* continued liable to an extent, until the period arrived at which some person other than the original debtor had acquired a consummate right in them; and the Court clearly held that goods seized by a sheriff, before sale, were so liable. The fanciful doctrine of a special property in an acknowledged public officer being at all material, seems never to have occurred to the great men who decided that

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case. The reason why the expressions as to special property are there introduced, are, as it seems to me, obvious enough; the distress is in the custody of the creditor himself, and, therefore, it might have been plausibly enough contended, that he having the possession, his special property (if he had any) was to be protected for his own benefit. But the Court looking to the substance and not the form, decided that, in seizing, he acted as an officer of the law; that he held as such, and that the goods were not really in his possession, but in the custody of the law; they having come to him by an especial authority given by the law, and not by the act of the party, as in the case of a pledge or the like; and the consequence being that no property, nor even any "possession in jure," passed to him. This case seems to me to be *a fortiori* as to the present case.

I proceed to enumerate, shortly, the other cases in which the law has been laid down in the same way. In *Rex v. Peck*\* the reporter says, it was taken for granted that the law was so. In *The Attorney-General v. Andrew*†, it is not indeed distinctly stated, whether the party had obtained possession under the subject's prior extent, before the right of the Crown commenced, but I think it can hardly be doubted that he had; for there the Lord C. B. Steel observes, "that the subject's "title is prior to the Crown, and is executed," 9 Rep. 129. Now, it appears from *Empson v. Bathurst*‡, that, until the liberate, no fee is due to the sheriff, because the execution is not executed; and I think this explains the language

\* Bunb. 8.

† Hardr. 23.

‡ Hutton, 52.

of the Lord C. B. Steel, and makes it consistent with what he adds, that Stringfellow's case is unanswerable.

In the case of *The Attorney-General v. Capell*\*, it is stated, "that although the goods were actually in *custodia legis*; yet, because the extent came before the property was vested by an assignment, it was held a good extent. Extents have been held good, that have been made of goods actually levied by virtue of a *feri facias*, and in the sheriff's custody, the extent coming before a bill of sale, made so as the property was not altered." This latter passage Mr. Baron Wood (who omits the former part of the report), calls "a note of the reporter, unwarranted by the case." To me it appears as a reason assigned by the Court for their previous judgment.

The case of *Lechmere v. Thoroughgood*† has been much relied on by the other side; but I cannot think it to be an authority of any weight. It is observable that the decision in that case is clearly right; and it is difficult to perceive how this point could ever have arisen. There the extent at the suit of the Crown was executed before any assignment under the bankruptcy had been made; so that, according to all the authorities, the Plaintiffs had no ground of action; and the execution and the extent being set up by the same parties, no question of priority, *inter se*, could well have arisen. Again, the writ of *feri facias* was issued before the sheriff had notice of the bankruptcy; and as the action was trespass, the Court on that ground might well decide in his favour. The *dic-*

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\* 2 Show. 482.

† Comb. 123.

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*tum* attributed to Lord Holt, that "the King's prerogative had been taken away by the statute "of frauds," cannot be supposed to have really fallen from that learned Judge; and yet this case, although thus questionable in its application to the present subject, has been one of the main grounds on which the two principal authorities on the other side, *Uppom v. Summer* and *Rorke v. Dayrell*, have been decided.

The case of *Clerk v. Withers* \* seems also to me to be wholly inapplicable to the present question. Indeed, like *Lechmere v. Thoroughgood*, it is only to be cited for certain *dicta* of the Court, as to the execution being complete by the seizure; for the decision itself is clear enough. It was there argued that the death of the creditor, after seizure under the *fiery facias*, did not give to the debtor the right of recovering back his goods from the sheriff; and the Court held that it did not: for on the one hand there was no act to be done in Court necessary to give the sheriff authority to act, his authority being complete by the *fiery facias*, and therefore the death was immaterial to that purpose; but, secondly, the levy under the writ was pleadable in bar to another action for the same debt, so that the debtor sustained no injury by the execution proceeding. But indeed this case would prove too much; for it is also true that after the award of the *fiery facias*, and before seizure, the same result would follow: *Thoroughgood's Case* †, cited by Gould J., in giving his judgment. Now it is not pretended that an award of *fiery facias* would bar the Crown before seizure. The principles, there-

\* 2 Ld. Raym. 1075.

† Noy. 73.

fore, of that decision are wholly inapplicable to this question. There are some *dicta* in that case certainly, which may be relied on: but I think that if they are read, as all such *dicta* ought to be, with reference to the case then before the Court, they also will be found not applicable to the present subject. To some purposes, no doubt, the execution may be called complete by the seizure. It undoubtedly was so at that time, as regarded priority between an execution creditor and the assignees of a bankrupt. It was not so in all cases, however, even between subject and subject, as appears from *Hutchinson v. Johnson*: and I think it is not so *a multo fortiori*, in a case between the subject and the Crown, which has a prerogative peculiar to itself, in interposing *in medio*.

*Curson's Case* \* is still less applicable. It depends on a totally different principle. There Curson acknowledged a statute to Starkey, and afterwards another to P. S. who assigned to the Crown. The liability, therefore, on which the Crown proceeded, was created subsequently to that to Starkey. After this, Starkey obtained possession under his execution; and it was held that the debt to the Crown did not bind the lands from its assignment, so as to avoid the subsequent but consummate execution. It may be observed also, that this case is within the statute (Hen. 8.); for the judgment was prior to the King's debt, and the execution was consummate before the King's extent. Lord C. B. Gilbert (p. 94.) gives this reason for it; for he says, "The creditor Starkey did not "by the liberate take the land *sub onere* of the King's

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\* 3 Leon. 239.

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" debt, because his lien was antecedent to it ; and it  
" were repugnant to construe him to take the land  
" *sub onere* of the King's debt, when he took it in  
" satisfaction of a debt precedent." So again, on  
the same principle it has been held that if A. infeoffs  
B. of his lands, after a judgment confessed by him  
to C., the Crown as assignee of C. cannot take  
more than C. could, viz. a moiety of the land ;  
although, no doubt, if the judgment had been con-  
fessed to the Crown originally, the Crown could  
have taken the whole. In fact it depends on the  
principle, that where the law allows a party to con-  
tract, it will not permit that contract, by any mat-  
ter arising *ex post facto*, to be made of no value, —  
a principle to which I have before referred, in dis-  
tinguishing goods on which there is a lien by con-  
tract from goods in the custody of the law.

The case of *Uppom v. Summer*, which is the lead-  
ing authority on the other side, would, I think, be  
entitled to much greater weight, if it had not pro-  
ceeded a good deal on the case of *Lechmere v.*  
*Thoroughgood*. Even taking the different reports  
of that case in the way suggested by Mr. Justice  
Gould, no great advantage as to clearness can be  
derived : and I cannot help thinking that the better  
course would have been, to have placed no great  
reliance on a case in which a part was to be picked  
up from one reporter, and a part from another, in  
order to make something like a connected account,  
instead of attributing the confusion to the most  
obvious and natural cause, viz. the inaccuracy of  
the reporter.

The same observation applies to the case of  
*Rorke v. Dayrell*. The Court there also relied a  
good deal on *Lechmere v. Thoroughgood*.

I shall not at present refer to the main ground on which both these cases proceeded, viz. the statute of H. 8., because I propose to consider that question separately. Subsequently to both these, the cases of *Rex v. Wells and Allnutt* \*, and *Rex v. Sloper and Allen* †, arose in the Court of Exchequer, in which the present question was decided, after reviewing all the authorities in the affirmative. Upon the whole I have arrived at the conclusion that the preponderance of authority also, as well as the principle on which such authorities ought to proceed, establishes the proposition that where an extent of the Crown comes after seizure and before sale, it ought to be preferred, unless by the statute 33 H. 8. s. 74. there has been an alteration made in the ancient prerogative by which the priority has been taken away.

I therefore come, in the last place, to the consideration of the true construction of that statute. There can be no doubt, even without authorities on this subject, that the statute must be construed as abridging the prerogative. But authorities are not wanting. In *Cecil's Case* ‡ the Court so expressly resolve; and other passages might be easily cited, if necessary, to the same effect. The real question, however, is not whether the prerogative is abridged; but to what extent it is abridged by the clause. If taken literally, the clause would, as has been well observed, place the Crown in a worse situation than a subject. This could hardly be the real intention of the legislature, in a reign not remarkable for such concessions. There are, however, two grounds, either of which, as it seems

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\* 16 East, 278.

† 6 Price, 114.

‡ 7 Rep. 92.



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to me, is sufficient to show that this clause of the statute is not applicable to the present question. First, the words are confined to suits commenced or taken, or process awarded, for the recovery of the King's debts. Now I apprehend that an immediate extent does not fall within either of these descriptions. They are confined to suits and process for the recovery of the King's debts, in the ordinary course, from his solvent debtor. An immediate extent is founded on an affidavit of the insolvency of the debtor, and issues not for the purpose of seizing his property to the amount of the debt, but all his lands and goods into the hands of the Crown, there to remain till the Crown debt is satisfied. It is, therefore, rather like a forfeiture incurred by him in consequence of his failure, than a suit or process for the recovery of the debt. Again, it may, according to the admitted course of the Exchequer, issue in the midst of the proceedings on an ordinary suit, and even where the debt is disputed: *Rex v. Pearson*. \* In an ordinary extent, which is a prerogative execution, the debt of course is conclusively settled by the judgment; but in an immediate extent, the debt is not settled, but may be disputed by the debtor, on the return of the writ. In fact, it is then that the suit respecting the King's debt, properly speaking, begins. The various differences seem to me to show that this proceeding could not have been contemplated by the legislature when they speak in this clause of suits and process for the recovery of the King's debts. But, secondly, I think that even if an immediate extent were a suit or process for the recovery of the King's

\* 3 Price, 288.

debts, still the clause would not be applicable to this case; and this will appear, from a reference to the state of the law as it existed at the time when the statute was passed. This is very clearly stated by Lord Coke, "As to the third protection, "*cum clausula volumus*, the King by his prerogative regularly is to be preferred in payment of "his duty or debt by his debtor, before any subject, although the King's debt or duty be the "later; and the reason hereof is, for that the *thesaurus regis est firmamentum belli et fundamentum pacis*, and therefore the law gave the King remedy by writ of protection, to protect his debtor, "that he should not be sued or attached until he "paid the King's debt. But hereof grew some inconvenience: for to delay other men of their suits "the King's debts were the more slowly paid; and "for remedy thereof it is enacted by the statute "25 E. 3., that the other creditors may have their "actions against the King's debtor, and proceed to "judgment, but not to execution, unless he will "take upon him to pay the King's debt; and then "he shall have execution against the King's debtor "for both the two debts." 1 Inst. 131. b.

It appears, therefore, that when the statute of 33 H. 8. was passed, the creditors of a Crown debtor could not proceed further than judgment, but were liable to be restrained altogether from taking out execution upon such judgment. By that statute new powers were given to the Crown, and new restraints, on the other hand, imposed on the prerogative. Certain debts to the King, not of record, which before did not bind the subject till recorded, were placed on the footing of a statute staple, and so bound from the time of contracting

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them. It is so laid down by Lord C. B. Gilbert, p. 88., and is in conformity with the general law which I have before stated from Lord Hobart's Reports; for in order to make the King's debts, not of record, bind from the time of their contracting, a statute would clearly be required. Lord C. B. Gilbert, in another part of his treatise, says, "This branch of the statute had its origin in the practice introduced by 3 H. 7. c. 3. of taking recognizances to the King before justices of the peace, instead of the ancient mode in use, before conservators of the peace, sheriffs, and constables, the two latter of whom, when they bailed, took the obligation in their own names, and not to the King. Now these recognizances to the King," says he, "being only personal securities, it became a doubt when they began to bind the lands of the subject; and formerly they held that such recognizances did not bind the land till they were returned of record." And the 56th section which, if construed literally, would appear only useless, as far as relates to the Court of Exchequer, may, I apprehend, have a sensible construction given to it, by referring to the second part of the 54th section, by which the King was authorized to proceed with suits depending, in the name of a common person, to his Grace's use, and which, therefore, required to be placed on the same footing, as to execution, with suits originally brought by the Crown. I think, therefore, that so far as relates to the King's debts, all that was in effect done by the various sections of the 33 H. 8. c. 39. was to give a priority to the particular debts, not being of record, as if they had been contracted originally by a recognizance, in

the nature of a statute staple, which binds from the time of the contracting. Now, reasoning *a priori*, it would be probable that such a new power would have some counterbalance, in order to place the subject as nearly as possible in the same situation as he was by the 25 E. 3. By that act the subject's writ of execution might be stayed from the time when the King's debt on record was contracted, a date easily to be ascertained. But when the King's debt, not of record, was to bind by this new power from the time of its being contracted, it might become very difficult for a third person to ascertain that period. And it might well be considered unjust to superadd such a hardship in the case of a person who levied under an execution sued out, indeed, after the King's debt was contracted, but after a contract of which, it not being of record, he could know nothing. It would, therefore, be not unnatural to suppose that some restriction would be imposed, rendering it necessary for the Crown, seeking to avail itself of the new power, to take some public steps before the judgment obtained by the subject should thus lose its efficiency. Now I apprehend that this was, in fact, done by the 74th section, which I construe as providing that if, before the King's debt is put in suit, the subject has obtained a judgment (on which, but for the new law, he might have sued out a writ of execution in due course), he shall still have the writ of execution, and proceed on it, notwithstanding the King's debt was in existence, and in defiance of any writ of protection from the Crown. In this case, therefore, the Crown is prevented from staying the proceedings by any writ of protection; and the creditor, if by using due diligence

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he can cause the sheriff to seize the goods and sell them before the extent comes on the part of the Crown, shall be entitled to reap the fruits of his diligence. The words are, "The King shall have "first execution;" which, I think, means, shall first have a writ of execution from "the Court." In like manner, in the statute 25 E. 3. c. 19. the words are, that the creditor having settled for the King's debts, "shall have execution" against the defendant; which clearly there means, "shall have "a writ of execution."

Upon the words, therefore, as well as on the intention of 33 H. 8. c. 39. s. 74., as collected from the act itself, compared with the statutes which preceded it, I have come, on both these grounds, to the conclusion, that according to the true construction of the 74th section, it has no reference whatever to the question now before your Lordships. I am aware that this is contrary to the construction put on the statute in the cases of *Rorke v. Dayrell* and *Uppom v. Summer*. But after fully considering those authorities, and the reasons assigned there, which do not satisfy my judgment; and finding them in opposition, as it seems to me, to the cases of *Rex v. Cotton*, *Attorney-General v. Capell*, *Rex v. Peck*, *Rex v. Wells and Allnutt*, *Rex v. Sloper and Allen*, and I would also say, to *The Attorney-General v. Andrew*, and the uniform course of the Court of Exchequer, I think that those cases are not well decided, and that, both on the ground that they are contrary to the true construction of the act, as deduced from a proper reading of it, if the question were *res integra*, and also on the ground that they are opposed

to cases of greater weight and authority to which I have already referred.

I have to apologise to your Lordships for the length at which I have considered this question ; but I trust that the importance of it, and the great weight due to the authorities on both sides, will be a sufficient reason for my having so done.

On the second question I shall not detain your Lordships, as I believe there is no difference of opinion upon it. I think that it should be answered in the negative.

*Taunton J.* — The first question propounded by your Lordships to the Judges, is one of very considerable difficulty, arising, in my humble judgment, not so much from the nature of the subject, when properly understood, as from the conflicting decisions of the Courts in Westminster Hall. This question may be considered in two points of view : first, whether by the seizure, on the part of the sheriff, of the goods under the writ of *feri facias*, the property is so altered as to leave nothing in the debtor upon which the writ of extent can attach ; and, secondly, whether the statute 33 H. 8. c. 39. s. 74. applies to the present case ; which latter inquiry involves a consideration of the law as to the prerogative with respect to the King's debts, before and at the time of passing that statute.

With respect to the first point, it is so clearly laid down in all the text-books as a general proposition, that the property of goods is not altered, but continues in the defendant until execution executed, that it cannot be necessary to say much on that point. But then a question arises, when is execution executed, that is, completed. It would seem, from the language of the writ of *feri facias*,

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that the sheriff has not completed the whole of his duty under the writ, until he has converted the goods and chattels seized into money; for the writ enjoins him, that of the goods and chattels of the defendant he cause to be made so much money; and he is further enjoined that he have that money before the King at Westminster, on the return day, to be rendered to the plaintiff; so that the selling or making of the goods into money appears to be a most essential part of the sheriff's duty.

But it has been contended in many of the cases on this subject, and more particularly by the late Mr. Baron Wood, in his elaborate judgment in the case of *The King v. Giles*\*, that the execution is executed by the seizure. And, certainly, if that were the case, there would be an end of the question; because it is abundantly clear, that, after execution executed, an extent from the Crown comes too late: *The Attorney-General v. Fort*.† In such case, the property is altered, and the Crown cannot, on process against A., seize the goods of B.

Considering the authority by which this proposition of the seizure alone changing the property has been maintained, it becomes necessary to investigate the law upon the subject, and examine the grounds upon which it has been supported. If the property be altered by the bare seizure, to whom does it pass? They say, to the sheriff. But this cannot be, for the goods would not be forfeited by his outlawry, or his conviction for felony; nor would they pass under a grant of all his goods. And if, after seizure, the defendant pays the debt

\* 8 Price, 314.

† 8 Price, 364 in Note.

to the sheriff, he is entitled to have his goods again without any grant from the sheriff; or if a leasehold, without re-assignment. So also, I apprehend, if goods in execution are burnt, or otherwise injured, without default of the sheriff, it is the loss of the defendant. The sheriff under the writ has a mere power to sell, without any interest, vested in him, except that which every bailee, such as a carrier, wharfinger, &c. who is answerable over, has for his own protection. This interest, if so it may be termed, is called a special property, as contradistinguished from a general property; and in respect of this, we know he may bring trover for the goods seized, against a stranger: but it is not a beneficial interest. In addition to these illustrations there is the authority of Lord Hardwicke, who lays it down in 2 Eq. Ca. Abr. 381., that neither before the statute of frauds, nor since, is property of the goods altered by mere seizure, but continues in the defendant until the execution executed. The cases cited by Mr. Baron Wood in support of his opinion, that the property is altered by the sheriff's seizure, and before actual sale, by no means bear him out. The first case he cites with respect to goods and chattels is *Lechmere v. Thoroughgood*. \* That was an action of trespass, not trover, brought against the sheriff. The extent there was after the seizure, and before any sale or *venditioni exponas*; and it appears certainly that a question was made whether the extent did not come too late, and the Judges are reported to have intimated an opinion that it did. But the case was not decided upon that ground. Judgment was

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\* Comberb. 123. 3 Mod. 236.



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ultimately given for the defendants (and not for the plaintiff, who impeached the validity of the extent) upon the ground that they could not be made trespassers by relation. The opinions, therefore, thrown out were mere *obiter dicta*, and the reports themselves are very loose and unsatisfactory. In one of them, Comberbach, Lord Holt is indeed reported to have said, "The property of the goods is vested by the delivery of the *fieri facias*;" but this is directly contrary to the opinion of Lord Hardwicke in 2 Eq. Cas. Abr., and to the two cases of *Burdon v. Kennedy* \*, and *Phillips v. Thompson* †, in which latter it was decided that by the delivery of the writ the goods were only so bound that the defendant could not dispose of them afterwards, and that the delivery of the writ to the sheriff is no execution thereof. And this *dictum* of Lord Holt, Lord Mansfield (in *Cooper v. Chitty* ‡) suspected was a mistake of the reporter.

The next case relied on by Mr. Baron Wood is *Clerk v. Withers*.§ In that case the principal question was respecting the operation of the statute 17 Car. 2. s. 8., upon a judgment by default obtained by an administrator, whether as that statute applies in terms only to judgment after verdict, there could be any personal representative of the intestate, who could by process compel the sheriff to sell. It was incidentally contended there, by counsel, that a seizure by the sheriff was a satisfaction of the debt; and therefore, that the plaintiff who had brought a *scire facias* to have restitution, should not have it. But the utmost length to which Lord Holt carried this was, that the seizure to the value of the debt discharges the defendant,

\* 3 Atk. 738.

† 1 Burr. 20.

‡ 3 Lev. 191.

§ 6 Mod. 220.

unless the execution be afterwards avoided; and that the seizure, so long as it continues, is a sufficient bar. But the point really determined was, that an execution, being an entire thing, when once begun, shall, as between the parties, be proceeded with, notwithstanding a change of sheriff, or the death of the plaintiff, nothing having occurred to avoid the seizure, or to intercept the authority of the sheriff before sale; the sale, under such circumstances, being considered but a formal part of the execution. There was no decision that as against one having a paramount claim the property by the seizure was irrevocably changed; but the whole is consistent with the hypothesis, that the goods, in such a case, are in the custody of the law.

With respect to the argument drawn from the statute, 21 J. 1. c. 19., which provides that where no execution or extent has been served and executed, creditors by judgment, statute, &c., or other security, shall not be relieved upon any such judgment, statute, &c., or other security, for more than a rateable part of their just and true debt with the bankrupt's other creditors, without respect to any greater sum contained in such judgment, &c., or other security; and upon which it has been determined that when a creditor has obtained judgment, and sued out execution, and a seizure has been made under it, if before sale an act of bankruptcy intervenes, the judgment creditor shall not be obliged to come in under the commission, but the sheriff may proceed to sell the goods; from which determinations Mr. Baron Wood draws the conclusion that they must have proceeded on the

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ground that as soon as goods have been seized under a *feri facias*, that seizure is considered in law as being an execution executed, the answer is, that these determinations only prove, that as between subjects an execution once begun by seizure shall proceed, notwithstanding a subsequent act of bankruptcy and commission issued; and in the case of *Audley v. Halsey*\*, which I believe was the first decision to this effect wherein the circumstances were precisely the same with those in *Stringfellow's Case*†, the main difference being that in the one, the bankrupt commissioners claimed against the extent, upon the statute staple, and in the other, the Crown, the Court expressly distinguished it from the case in *Dyer* by saying, "For there, although the goods were extended, yet they were not delivered to the conuzee, and the writ was not returned; and the writ of privilege was for debt due to the King, wherein the King hath his prerogative by the common law." In addition, I may observe, that the distinction taken in the recent cases of *Wymer v. Kemble*‡, *Nottey v. Buck*§, and *Morland v. Pellatt*||, which were in exposition of the statute 6 G. 4. c. 16. s. 108., proceeded principally upon this very difference between a mere naked seizure before bankruptcy, and a seizure consummated by sale, or the payment of the money directed to be levied. In *Wymer v. Kemble* the goods of the debtor had been seized under a *feri facias*, and delivered to the creditor under a bill of sale by the sheriff, then a bankruptcy followed; and it was held that the plaintiff had ceased to be a creditor, the original

\* Cro. Car. 148.

§ 8 B. &amp; C. 160.

† Dyer, 67. b.

|| 8 B. &amp; C. 722.

‡ 6 B. &amp; C. 479.

debt having been extinguished by the sale. The like decision was come to in *Morland v. Pellatt*, where, though there had been no sale of the goods, the balance of the money directed to be levied had been paid over to the sheriff before the act of bankruptcy. But in *Notley v. Buck*, where the sheriff had made a seizure before the act of bankruptcy, but the goods remained in his hands unsold at the time of it, it was held, that the sheriff could not pay over to the creditor the proceeds of the execution received upon a sale after the bankruptcy.

But although the position, that the property is not divested out of the debtor by mere seizure under a *fieri facias*, was partly admitted by the counsel of the Plaintiff in error in this case, yet it was most strongly expressed by him in his argument, that by the seizure the judgment creditor here had a lien on the goods, or a special property therein; and that the Crown, under an extent, can only take subject to that lien or special property. And this right of the judgment creditors, he observed, had not been adverted to in any of the cases with respect to the property. Many other cases might be added; but enough, probably, has been said; and I will add only the authority of Mr. Justice Bayley. In *Morland v. Pellatt* the learned Judge says, "After seizure, and before sale, the sheriff has a special property in the goods, but the debtor has the general property. Up to that time, therefore, the debt is not extinguished; and the judgment creditor has a security for his debt." This special property is in the sheriff, not as trustee for the judgment creditor, but for the purpose of his own protection. Neither had the judgment creditor, in this instance,



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any lien on the goods. Let us see what a lien is. In *Hammond v. Barclay*\*, Mr. Justice Grose says, "A lien is a right in one man to retain that which is in his possession, belonging to another, till certain demands of him, the person in possession, are satisfied." The Master of the Rolls, in *Gladstone v. Birley*†, lays it down, "The question always is, whether there be a right to retain the goods till a given demand shall be satisfied." In *Lickbarrow v. Mason*‡ Mr. Justice Buller observes, "Liens at law exist only in cases where the party entitled to them has the possession of the goods; and if he once parts with the possession after the lien attaches, the lien is gone." In *Heywood v. Waring*§ Lord Ellenborough says, "Without possession, there can be no lien. A lien is a right to hold; and how can that be held, which was never possessed?" In *Hallett v. Bousfield*|| Lord Eldon asks, "How can the doctrine of lien, that is, the right of a party having property in his possession to retain it until his demand is satisfied, be applied to the interest of a freighter, who has no possession, the whole being in the possession of the owner?" And many other *dicta* to the same effect are collected by Mr. Montagu, in his Summary of the Law of Lien.\*¶

So here, I ask, how can the doctrine of lien to retain these goods be applied to this judgment creditor, who had no possession, the goods being in the possession of the sheriff? The sheriff seizes not as the agent or servant of the party, but as a minister of justice and an officer of the Court; and therefore his possession is not the possession of the

\* 2 East, 227.

† 2 Meriv. 404.

‡ 6 East, 25. note.

§ 4 Campb. 291.

|| 18 Ves. 188.

¶ Introductory Chapter, p. 1. &amp;c.

creditor, but the custody of the law. But if there were no lien, the cases of *The King v. Humphrey*\*, *The King v. Lee*†, and *Casberd v. The Attorney General*‡, which were cases of a wharfinger's and factor's lien, and an equitable mortgage, by deposit of the title deeds, are inapplicable; the creditor there having had actual possession of the articles in respect of which he claimed. But when goods are in what is called the custody of the law, the property is, as it were, in abeyance, and must ultimately belong to the party to whom, under all the circumstances, the law adjudges it.

But it was said that the judgment creditor, by force of the seizure, had at least a security. This has certainly been so decided with reference to the 6 G. 4. c. 16. s. 108.: but I do not see what it proves. The security may be vested and certain, or it may be contingent and defeasible. It does not necessarily import present property, nor even beneficial interest. If tenant for life without impeachment of waste, or tenant in tail, sell trees standing and growing on the land, which he may lawfully do: the vendee, in common language, might be said to have a security for the money which he has advanced; but if the vendor should die before the trees are severed from the soil, the right of the remainder man or issue in tail steps in and defeats that of the vendee. So here, although the judgment creditor had a security, yet still it was a possible case,—I say no more at present,—that a *jus tertii* might interpose and destroy it.

This brings me to the consideration of the second branch of the question, namely, whether the extent

\* 1 M'Clell. & Y. 173.

† 6 Price, 369.

‡ 6 Price, 411.

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in this case, at the suit of the Crown, constituted such a *jus tertii*. It is perfectly clear, that at common law, the King had very peculiar prerogatives, much beyond the common right of a subject, for the recovery of his debts. Of these (not to mention others which are not to the present purpose), one was, that where one was indebted to the King and likewise to other persons, the King's debt was to be preferred in payment; that is, the King was to be paid before any other creditor of the party, and consequently to be preferred in an execution; Mad. Exch. 183. c. 23. s. 7. The general rule is, and this has been acknowledged in all the cases, that when the right of the King and that of a subject concur, that of the King shall prevail. See the instances put in *The Attorney General v. Andrew*.<sup>\*</sup> But in ancient times the law of prerogative went further than this, and provided the most effectual means of security that the King's title should always be the first. It prohibited the creditors of a King's debtor even from taking out execution until all the King's debts were satisfied. Although the King's debts were the later in point of time, and if the King's debtor, notwithstanding, was sued or attached, the King had a remedy by writ of protection, to protect his debtor; Co. Litt. 131 b. Fitz. N. B. 65, 66. tit. Protection, *The King v. Cotton*.<sup>†</sup> A King's debtor could not make a will to dispose of his chattels to the King's prejudice; nor could his executor have administration without permission from the King, or Justices, or Barons of the Exchequer, upon giving security to answer the King's debts. ‡

<sup>\*</sup> Hardr. 23. Plowden, 258, 259. 264.      † Parker, 123.

‡ See numerous precedents in Mad. Exch. c. 23.

The prerogatives have at different times been controlled and regulated by statutes; but these very statutes testify their existence.

Thus in the statute of *Magna Charta*, 9 H. 3. c. 18., it is enacted, that “ If any holding of the  
 “ King a lay fee do die, and the sheriff shew the  
 “ King’s letters patent of his summons for debt  
 “ which the dead man did owe to the King, it  
 “ should be lawful to the sheriff to attach and enrol  
 “ all the goods and chattels of the deceased, being  
 “ found in the lay fee, to the value of the debt, so  
 “ that nothing thereof should be removed until the  
 “ debt be paid off; and the residue should remain  
 “ to the executors to perform the testament of the  
 “ deceased.” Again, the statute 25 Edw. 3. c. 19.;  
 after reciting, that “ Forasmuch as the King had,  
 “ before that time, made protections to divers  
 “ people which were bounden to him in some man-  
 “ ner of debt, that they should not be impleaded of  
 “ the debts which they owed to others, till they  
 “ had made gree to our Lord the King of that which  
 “ to him was due by them, by reason of his preroga-  
 “ tive; and so during such protections no man hath  
 “ used, nor durst implead such debtors; enacts,  
 “ that notwithstanding such protections, the parties  
 “ which have actions against their debtors, shall be  
 “ answered in the King’s Court by their debtors,  
 “ and if judgment be thereupon given for the plain-  
 “ tiff or demandant, the execution of the same judg-  
 “ ment shall be put in suspense till gree be made to  
 “ the King of his debt; and if the creditors will un-  
 “ dertake for the King’s debt, they shall be there-  
 “ unto received, and shall have execution against  
 “ the debtors of the debt due and adjudged to them,  
 “ and also shall recover against them as much as

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“ they shall pay to the King for them.” After the passing, therefore, of this statute, which considerably abridged the ancient prerogative, although a subject might pursue his debtor to judgment, yet he could not sue out execution until the King’s debts were paid or secured, the King being entitled to the first execution. This execution, it is material to recollect, at the common law was against the body, the land, and the goods of the accountant, or the King’s debtor. In *Sir William Harbert’s* case\*, the words of Lord Coke on this point are, “ It was “ resolved, that at the common law the body, the “ land, and the goods of the accountant, or the “ King’s debtor were liable to the King’s execution; “ for *Thesaurus regis est pacis vinculum et bellorum “ nervi*,” and therefore the law gave the King full remedy for it; and therewith agrees 5 Eliz. Dyer, 324. and Plow. Com. 321. *Sir William Cavendish’s* case, who was treasurer of the chamber, 24 E. 3., *Walter de Chirton’s* case, and infinite precedents in the Exchequer, to prove, that for the King’s debt the body and the land of the debtor shall be liable by the common law, before the statute of 33 H. 8. c. 39. The statute did not give to the Crown this triple remedy; and whether it could be pursued, as now, by one single process, or must have been separately worked out by different writs, is a matter of no moment.

Thus stood the law until the statute 33 H. 8. c. 39. passed; and upon this short statement there seems to me no doubt that, if no alteration of the law in this respect was made by that statute, the King, in the present instance, is entitled to preference under the extent, although it did not

\* 3 Rep. 12. b.

reach the sheriff until the *feri facias* was partly executed by seizure; for it would be absurd to hold, when it was unlawful to issue any execution before the King's debt was paid, that the creditor, by his disobedience of the law in suing out an execution, should gain an advantage over the King.

But the stat. 33 H. 8. c. 39., altered the law in this matter. That stat., sect. 74., enacts, "That  
 " if any suit be commenced or taken, or any  
 " process be hereafter awarded for the King, for  
 " the recovery of any of the King's debts, that  
 " then the same suit and process shall be preferred  
 " before the suit of any person or persons, and that  
 " our said sovereign Lord, his heirs, and success-  
 " ors, shall have the first execution against any de-  
 " fendant or defendants of and for his said debts,  
 " before any other person or persons; so always  
 " that the King's said suit be taken and com-  
 " menced, or process awarded for the said debt, at  
 " the suit of our said sovereign Lord the King, his  
 " heirs or successors, before judgment given for  
 " the said other person or persons." It has been  
 very properly observed by Lord Chief Baron  
 Macdonald, in his judgment in the case of *The  
 King v. Wells and Allnutt* \*, that, according  
 to the construction put upon this clause in the  
 cases of *Uppom v. Sumner* and *Rorke v. Dayrell*,  
 it must have the effect of postponing the King's  
 execution, though it should happen to be prior  
 both in *teste* and delivery to the subject's execu-  
 tion on his prior judgment, which would be putting  
 the Crown, as to its execution, upon a worse foot-  
 ing than a subject, inasmuch as, between subject  
 and subject, the priority of the delivery of the writ

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\* 16 East, 280, 281. n.

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of execution always determines the question of preference, without regard to the priority of judgment. Such a result, surely, could never have been intended; and this goes some way to shew that the construction animadverted upon is not the right one. But I am of opinion, upon other grounds, that this section of the statute has been misunderstood. The first branch declares generally that the King's suit and process shall be preferred before the suit of any person or persons. This seems to be distinct from the latter branch, which confirms the right which the King had before this statute, of having the first execution, not a preference where there are two concurring executions, one at the suit of the King; but the first execution, that is, the sole and exclusive execution against any defendant for his debt before any other person. Then comes the condition or proviso, "so always that the King's said suit be taken and commenced, or process awarded, before judgment given for the said other person." Now I take this 74th section to be a supplement to the 19th chap. of the 25 E. 3. and the judgment mentioned herein to mean a judgment obtained by favour of the latter statute. Then the meaning will be this: Where the subject has obtained no judgment, the King is entitled, as of course he must be, if he sues out process to the first execution. But if the subject has obtained a judgment before any process sued out by the Crown, the execution thereof shall not, by virtue of the stat. 25 E. 3. c. 19., be put in suspense till gree be made to the King of his debt; but in such event he is at liberty to follow it up by execution, although the King's debt be not paid; and if he can get his execution completely

executed before the King's process be sued out, he will be safe, for the King is only to have absolutely the first execution, where the King's suit is taken and commenced, or process awarded, before judgment given for the other person. By this construction, the greater difficulties, in my humble judgment, will be overcome, though perhaps some may remain; and this will account for the disuse of protections afterwards, which would be unavailing when the King had no longer a right in all cases to the first execution.

So much by way of argument from the account we have in our books of ancient prerogative and from the statutes.

The cases that have been decided upon this question have been so often cited, that it is unnecessary to go through them all; I will only observe, that the weight of authority appears to me to preponderate very considerably in favour of the right of the Crown.

The course of decision in the Court of Exchequer has been uniform, with the exception of the *Attorney General v. Andrew*\*, and Mr. Baron Wood's opinion in the *King v. Giles*: and considering that this is the King's great Court of revenue, in which the Judges are more particularly conversant with these matters, this consistency of judgment ought to carry great weight with it.

In the *Attorney General v. Andrew*, the reasons assigned by the Judges are extremely short, and, in truth, consist only of two: the one, that the statute 33 H. 8. abridges the prerogative, and controls the common law, and that the words in the 74th section make a condition precedent, and imply a negative; the second, that there the sub-

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ject's title was prior to the King's, and was executed. I have already explained why, in my opinion, the interpretation that has been made of this statute is an erroneous one, and why this statute does not affect the present case. With respect to the holding, that the subject's title was executed, if *liberates* had issued upon the *elegits*, which does not appear to have been the case, there is no doubt but that this was so. But if nothing more had been done than extending the lands upon the *elegits*, I take the liberty of saying that the subject's title was not executed; and for this, *Stringfellow's case* \* is my authority. In that case, Stringfellow had sued out a writ of *extendi facias*, to have execution of a statute staple. The sheriff made extent of the defendant's lands, and seized them into the King's hands, but did not make livery; and afterwards a writ of the King's prerogative issued out of the Court of Exchequer, reciting the prerogative which the King ought to have, to be first served and paid by his debtors; and commanded the sheriff to levy the debt of the goods of the debtor; and if he had not sufficient, then to extend his land. This writ was delivered to the sheriff after the day of the return of the first writ, but before the first writ was returned. On the sheriff returning to the King's writ, that the debtor had no goods or lands to be extended, besides the goods and chattels, lands and tenements, above extended, and therefore, as to the further execution of that writ, he had done nothing; it was holden in the Exchequer for law, that the sheriff should be amerced, if he would not amend his return, namely,

\* Dyer, 67 b.

return the extent into the Exchequer, for the service of the King's debt; and Justices Hale and Bromley were of the same opinion, because the property of the goods and land was not in Stringfellow before they were delivered to him by the writ of *liberate*. This case has always been acknowledged for good law; and although a query is subjoined by the reporter, because the goods, on being seized into the King's hands to be delivered to the party, were in the custody and consideration of the law, and privileged from all other executions, yet this doubt proceeds from not attending to the distinction between the King's case and that of a common person. In the case of a subject, goods distrained or seized in execution, cannot be again taken, for that reason; but it is otherwise in the case of the King. *The Attorney General v. Capel*. \* See also the note by Manwood, Chief Baron, in margin, Dy. 67 b.

The cases of *Uppom v. Sumner*, and *Rorke v. Dayrell*, appear to me to have been determined on wrong principles. Little research appears to have been made, in either, into the nature and extent of the royal prerogative at common law. In the first, the judgment proceeded principally on the stat. 33 H. 7. c. 8. and in the latter, on the mistaken assumption that the property was changed by the delivery of the writ to the sheriff. With all my respect for the learned Judges by whom these cases were decided—and no one can have greater—I cannot assent to them; and I do this with the more freedom, because, on no less than three solemn occasions, the Court of Exchequer has subsequently testified a similar dissent.

The case of *Thurston v. Mills* † is no authority

\* 2 Show. 481.

† 16 East, 254.

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either way, because, although the Court intimated that they had formed an opinion on the point, it was not divulged : with these exceptions, the determinations of the Courts will be found, from the earliest times, to have been in favour of this prerogative. I therefore humbly give it as my opinion, that the first question propounded by your Lordships should be answered in the affirmative.

With respect to the second question submitted to the Judges, Whether it makes any difference whether the writ of extent be in chief or in aid, I am of opinion, that in this respect there is no difference between an immediate extent and an extent in aid. It appears to have been the practice in very ancient times, that if the King's debtor was unable to satisfy the King's debt out of his own chattels, the King would betake himself to any third person who was indebted to the king's debtor, and would recover of such third person what he owed to the king's debtor, in order to get payment of the debt he owed to the Crown : *Mad. Exch. c. 23. s. 8.* In like emergencies, the King's debtor or accountants were wont to have writs of aid, whereby to recover their debts of such persons as were indebted to them, in order to enable them to answer the debts they owed to the King. Many precedents of both modes of proceedings are cited by *Madox*, in the notes, *ch. 23. s. 8. 12.* One of them is in the fifth year of *Rich. I.*, in the great roll whereof it is stated, that *Henry de Cornhill* owed the King 100*l.* for the arerage of the *cambium* of all England, except *Winchester*, and 6*l.* for the term of the land of *Engelran de Mustereil*, and *William Earl of Albemarle* acknowledged before the Barons of the Exchequer that he owed so

much to Henry de Cornhill, and thereupon William Earl of Albemarle was charged (as debtor to the King) with the said respective sums. Others are of the reigns of H. 3. and Edw. 1. In some of them, the mandate is to the sheriff, to distrain a former sheriff, or to aid collectors and assessors in distraining persons indebted to the King for aids or the like, and therefore are not properly extents in aid, the process being against persons originally indebted to the Crown. But in some instances, as in those of the executors of Herbert de Burgh, Walter de Watford, and the executors of the late Bishop of Hereford, the mandate to the Barons is, that they distrain the debtors of those particular persons, in order that the King may be satisfied the debts which they owe to him respectively, according to the law and custom of the Exchequer. This process, though now called an extent in the second degree, is in principle the same as that called peculiarly an extent in aid: the only difference being, that, in the one case, the Crown is the real as well as the nominal plaintiff; in the other, the process is sued out for the recovery of the debt due to the King's debtor, and for his benefit.

It is clear, therefore, from these authentic records, that the practice of charging the debtors of a person indebted to the King for the King's debt, goes back as far as the period of legal memory; and the process has been gradually moulded into its present shape, and limited to its present extent, by statutes, and by the rules and decisions of the Court of Exchequer.

I am of opinion, therefore, that it makes no difference, whether the writ of extent was in chief or in aid.

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*Vaughan B.*—After much consideration devoted to the question which your Lordships have been pleased to propound to the Judges, I am of opinion that the writ of extent issued by the Crown, under the circumstances stated, ought of right to supersede the subject's execution.

During the progress of this inquiry, my mind has been agitated by doubts suggested by a review of the conflicting judgments which have been pronounced in the superior Courts of Westminster Hall upon this long controverted question, involving a claim to exercise an important prerogative of the Crown on the one part, and a valuable civil right of the subject on the other.

The arguments in favour of the Plaintiff in error may be resolved into the following propositions:—First, That no prerogative existed in the Crown, by the common law, to issue an extent, whereby the goods, and chattels, and lands of the King's debtor might be extended, and his body seized to enforce the payment of his debt.

Secondly, That, admitting the existence of such prerogative right under the common law, it was restricted and controlled by the statute 33 H. 8. c. 39., so as to prevent its operation in the case *sub judice*.

Thirdly, That, independent of all prerogative right, after an actual seizure of the sheriff under a *feri facias* at the suit of a judgment creditor, the property in the goods taken became thereby altered—no longer continuing the property of the debtor, and, consequently, no longer amenable to the process of the Crown.

Fourthly, That the sheriff acquired by the seizure, such a special property in the goods, as to deprive

the Crown of any benefits to be derived from this process of extent.

The main question depends upon the true construction of the 33 H. 8. c. 39. s. 74.; but in the interpretation of this statute, the important preliminary inquiry presents itself, viz. whether before, and independent of, any legislative enactments, the Crown was not entitled by the common law to extend the lands, and to take the body as well as the goods and chattels of the King's debtor, in satisfaction of the debt.

Sir Edward West, in his Treatise upon the Law and Practice of Extents, states (but, as I conceive, erroneously), that the Crown derived its power of issuing an extent from the provisions of this statute. In page 108., he observes that "this statute gave to the Crown a new kind of execution for all its debts; a species, too, of execution, which, before that statute, was the subject's execution, and the subject's only." And in page 110., he repeats, that the subject's process by extent being imparted to the Crown, "the Crown will, of course, have the same rights in the use of that process as the subject." The author of that treatise seems to have been betrayed into this error, by what I would rather call an equivocal than an inaccurate expression of Lord Coke, in his comment upon the 8th cap. of *Magna Charta*, 2 Inst. 19., which contains the following passage:—"After the statute 33 H. 8. c. 39. was made for levying of the King's debts, the usual process to the sheriff at this day is *Quod diligenter per sacramentum*," &c. From the words "after the statute," Mr. West infers that the King was not empowered, by virtue of his prerogative, at the common law, to issue any writ of

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extent to enforce the payment of his debts before that statute, such authority being created and conferred for the first time by the provisions of that act. Lord Chief Baron Gilbert understands this expression of Sir Edward Coke's, "after the statute," &c. in the same sense, although he suggests a doubt respecting its accuracy; for, in page 127. of his *Treatise on the Court of Exchequer*, after transcribing a process known by the name of the long writ, he observes, "My Lord Coke says this writ "was made since the statute; but of this I have "great doubt, because it seems so contrived, that "an inquisition should be found whether the debtor "had any goods and chattels; and if, upon inquisition, there were none found, then to extend "the lands and to take the body of the debtor. "So that it seems this writ might have been "used before the statute of H. 8. without any "violation of *Magna Charta*; for if it were found "that the debtor had no goods, they might seize "the lands and take the body; and therefore it "seems to be a writ was used upon motion to "the Court, and in cases of necessity, before the "statute of H. 8.; but since that statute, they may "have a *capias levare* or extent without any such "inquisition touching the goods."

The opinion of Sir Edward Coke appears to me to have been misapprehended. I do not understand him to affirm that the King had no power of issuing an extent for the levying of his debts before the statute; but that the particular writ, of which he gives only a partial extract, had been the usual process to the sheriff since that statute, and was so at that day. Indeed, the very first passage in the 8th cap. of *Magna Charta*, upon

which he is commenting, — “*Nos vero vel Ballivi nostri non seziemus terram aliquam vel redditum pro debito aliquo quandiu catalla debitoris præsentia sufficiunt ad debitum reddend, et ipse debitor paratus sit inde satisfacere,*” — was introduced in ease of the subject, for the purpose of restraining the power of the Crown, and correcting an abuse of the prerogative, by preventing the seizure of the lands and rents of the Crown debtor, where goods and chattels could be found sufficient to satisfy the debt. Lord Coke observes, upon this passage, that, “by order of the common law, the King, for his debt, had execution of the body, lands, and goods of the debtor; and adds, this is an act of grace, and restraineth the power that the King had before.” Both the text and the comment, therefore, conspire to prove that Lord Coke could never intend to ascribe the origin of the process of extent to the statute of H. 8. Indeed, the reports of that eminent lawyer are replete with resolutions confirming the prerogative right of the Crown to issue process of this description from the earliest times. I will cite one case only from his reports, in proof of this position, *Sir William Harbert's case*.\* It was there resolved, that, at the common law, the body, the lands, and the goods of the King's debtor or accountant were liable to the King's execution, for that *thesaurus regis est pacis vinculum et bellorum nervi*. And, therefore, the law gave the King the full remedy for it, and therewith agrees 5 Eliz. Dyer, 224. and Plowd. Com. 321. a.; *Sir William Cavendish's case*, 24 Edw. 3., *Walter*

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\* 3 Rep. 12. b.

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*de Chirton's case*; and infinite precedents in the Exchequer, to prove that, for the King's debt, the body and land of the debtor shall be liable by the common law before the statute 33 H. 8. c. 39.

I have before observed, that Lord Coke gives only a partial extract of the usual process which he states to have issued since the statute 33 H. 8. If the whole of it had been inserted, it would have appeared, from the concluding part, whether it issued from the office of the King or of the Lord Treasurer's remembrancer. The long writ introduced and commented upon by Lord C. B. Gilbert, in the chapter in which he expresses his doubts respecting the accuracy of Lord Coke, as to the period of time when that species of process was first issued, for the purpose of securing the King's debts, was undoubtedly a writ from the office of the King's remembrancer, as appears from the concluding part of it, containing an injunction not to sell, until the further order of the court, from the bonds remaining in the custody of the King's remembrancer, and from referring, in distinct terms, to the statute 33 H. 8. as the authority from which it emanated, and being also signed by Masham, who was at that time an officer, not in the Lord Treasurer's, but in the King's remembrancer's office.

Without professing to have examined the infinity of precedents to which Sir Edward Coke alludes, the searches I have made have satisfied my mind, that, from that department of the revenue office, in the Court of Exchequer, under the control and management of the Lord Treasurer's remembrancer, a strong prerogative process, or writ, combining, in effect, the *fieri facias*, the *levari facias*, and *capias corpus*, has, from the ear-

hies times, been issued upon special application, founded on the necessity of the case, without any previous summons or notice, and directed at once against the goods and chattels, lands and tenements and body of the Crown debtor, to levy all such debts as, by being charged upon the revenue rolls in that office, were become in the nature of recorded debts or duties.

The more ordinary and usual course of proceeding was to transmit them to the Pipe Office, and enter them upon the roll annexed to the summons of the Pipe, to be levied by that process; and if returned *nihil* by the sheriff, to introduce them into a schedule, as described by Lord Chief Baron Gilbert, and send them into the office of the Lord Treasurer's remembrancer, to be levied by the general prerogative process or long writ, which issued periodically at two stated seasons of the year, for the recovery of all such debts.

I will not abuse your Lordships' attention, by stating the reasons which have led me to conclude the Lord Chief Baron Gilbert may have confounded the long writ issued from the office of the King's remembrancer, under the authority of the statute 33 H. 8., with the long writ which it has been immemorially the course of the Court of Exchequer to issue from the office of the Lord Treasurer's remembrancer. It may be sufficient for the purpose of the present inquiry to take it upon the authority of so eminent a Judge, who presided in the Court of Exchequer, that, long anterior to the statute of H. 8., such debts of the Crown as were entered on the great roll in the Treasurer's remembrancer's office might be

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levied by a process having the force and virtue of an immediate extent.\*

I would, therefore, conclude my observations upon this first branch of the inquiry with a passage from Lord Chief Baron Gilbert's treatise on the Court of Exchequer, p. 90.:—"An extent of a later *teste* supersedes an execution of the goods by a former writ; because by the King's prerogative at common law, if there had been an execution at the subject's suit, and afterwards an extent, the execution was superseded until the extent was executed, because the public ought to be preferred to private property."

I proceed to the second branch of the inquiry, how far the statute 33 H. 8. c. 39. restricts or controls this prerogative? In considering the legal operation and effect of such of its clauses as have relation to this question, we should remember that it was passed at a period of time when that monarch was in the plenitude of his power, when the revenues of the Crown had been recently greatly augmented by the surrender and dissolution of the abbeys and monasteries, and by the daily increasing commerce and prosperity of the kingdom. Nor can we forget that the history of that reign records more frequent examples of sacrifices extorted from his subjects than of any voluntary surrenders of his acknowledged prerogatives to them.

Upon the first forty-nine sections of this statute, relating to the erection of the Court of Surveyors of the King's lands, its officers and their authority

\* See Mr. Price's treatise upon that branch of the Court of Exchequer which relates to the office of Lord Treasurer's remembrancer.

(all which have long since ceased to exist), it becomes unnecessary to make any observations.

The object of the legislature in the six consecutive enactments, from section 50. to 56. inclusive, was the more speedy recovery of debts due to the Crown, upon obligations and specialties, which not being (before that act) enrolled of record, were not amenable to the strong prerogative process of extent. The statute, therefore, gave them the force and effect of obligations acknowledged according to the statute staple at Westminster. It gave also to the King his costs, as to a common person. It gave to each of the several courts, as well to those recently erected as to those already existing, and mentioned in the 55th section, the same co-extensive power and authority to commence and prosecute suits for debts and duties grown due to the Crown, in respect of obligations remaining in each of these several courts and offices, and to hear and determine them, and to award execution upon the body, lands, and goods of the parties condemned therein. But it appears to me a fallacy to suppose that, because it directed in what offices and courts (some of those courts being then recently erected) the suits shall be commenced, and what process may in their discretion be used (mentioning *inter alia* the *capias extendi facias*, &c.), that therefore the power of issuing such process was given, for the first time, to the Court of Exchequer. As applied to obligations and specialties, which before that statute were matters in *pais*, not yet ripened into matters of record, I admit they were not liable to the immediate extent, until rendered mature for that process by becoming enrolled of record.

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The sections to which I have referred, from 50. to 56., appear to me exclusively applicable to the debts and duties accruing in respect of the obligations and specialties mentioned in those sections.

Section 57. enlarges the jurisdiction of the several courts therein enumerated, extends their authority to a variety of other subjects having no relation to the present inquiry, and, after introducing various regulations respecting the offices of receiver, auditor, accountant, &c. (imposing penalties upon them for the breach of their respective duties), the statute proceeds to enact the 73d and 74th sections, the last of which gives occasion to the present question.

The 73d section directs, that in all actions and suits for the recovery of any debts which shall accrue to the King, by reason of any attainder, outlawry, forfeiture, or gifts of the party, or by any other collateral way or means, it shall be sufficient to declare generally, without showing the circumstances at large, according to the due order of the common law. Then follows immediately the much controverted 74th section in the following words:—

“ If any suit be commenced or taken, or any process be hereafter awarded for the King, for the recovery of any of the King’s debts, then the same suit and process shall be preferred before the suit of any person or persons, and our Sovereign Lord, his heirs and successors, shall have first execution against any defendant or defendants, of and for his said debt, before any other person or persons; so always that the King’s said suit be taken and commenced, or process awarded, for the said debts, at the suit of our said Lord the King, his heirs and successors,

“before judgment given for the said person or persons.”

The first branch of this clause, introducing the proviso, contains a plain declaration of the King's prerogative right under the common law, by which he was at all times entitled to have his suit preferred, and to have first execution.

The proviso was undoubtedly intended to ingraft some qualification or restriction upon that right, or at least to confer a privilege upon the subject; and the question arises as to the extent of that restriction or privilege. By the statute 25 Edw. 3. c. 19. the subject (notwithstanding the King's ancient prerogative of granting writs of protection) was empowered to implead his debtor and to proceed to judgment, with a stay of execution, until the King's debt was satisfied; and it seems to me that this further privilege was granted by the 74th section, viz. that he should no longer be restrained from proceeding to issue an execution in those cases to which that section applied, viz. in which the Crown had neither commenced any suit nor awarded any process before his judgment was obtained. The legislature did not, I conceive, intend to interfere in any cases of conflicting or concurrent executions, but simply to remove the restraint continuing upon the subject at the time of the passing of the act of the 25 Edw. 3., and to permit him to sue out execution, without being guilty of any violation of the law, which before the statute 33 H. 8., he could not do. The section being silent as to which execution shall be first satisfied, imports only (according to my view of it) that the subject's execution may first issue,

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still leaving the prerogative right of the Crown to issue an extent unimpaired.

Supposing this to be the true construction of the statute, to what suit of the Crown does this 74th section extend? Does the proviso or condition controul and over-ride all the preceding clauses in the act, or is it confined and limited in its operation to the subject-matter of the 73d section immediately preceding? This question is involved in some obscurity. The collocation of the sections would favour the latter and more limited construction; but the words in the 74th section are sufficiently general and comprehensive to embrace other debts than those designated in the 73d section, as accruing to the King "by attainder, outlawry, forfeiture, or gift of the party, or by any other collateral way or means;" at the same time, if the restriction be construed to apply to every species of crown debt, so as to include the obligations and specialties mentioned in the 50th section, it would involve the difficulty, nay, the absurdity, of supposing that an act of parliament, passed for the professed purpose of facilitating the speedy recovery of the King's debts, by giving them the force and effect of a statute staple, would, instead of expediting their payment, place the King in a more unfavourable position than any of his subjects. In every race between subject and subject, the point of time to determine the priority of execution is not the moment in which judgment is obtained, but that in which the execution is delivered to the sheriff; whereas the construction contended for by those who impugn the preferable title of the Crown would give to the subject, in possession of a judgment, the power of postponing, indefinitely, the

King's execution, unless there had been an inception of his suit, or an award of his process before such judgment was signed.

I interpret the word "debts" in this section, (taking it with reference to all the previous provisions of the statute) to mean such debts, as not being enrolled of record, are in *feri* only, unascertained, and remaining to be recovered through the medium of a suit to be commenced, or "process to be awarded;" inasmuch as informations for penalties always conclude with a prayer that process may be awarded. This construction would also embrace such debts as are mentioned in the immediately preceding section; and unless the Crown had, in all such cases, actually commenced the suit or awarded its process, the subject having obtained a judgment might proceed to issue execution, and thereby, in obedience to the language of the proviso, prevent the King from having first execution, to which, before that statute, he was entitled. I do not, however, read the clause as prohibiting the Crown from issuing an extent under the circumstances stated in this case.

I come next to consider the question, Whether after seizure by the sheriff under a *feri facias*, at the suit of a judgment creditor, the property in the goods taken becomes thereby altered, so as to be no longer liable to the extent of the Crown? The Crown claims to be entitled to priority in the execution of its process by virtue of its prerogative. The subject denies the existence of any such prerogative, asserting, that after the execution has once begun, by an actual seizure made, the crown has no longer anyright to intervene, the subject's execution from that time being entitled to the preference.

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Upon this question the Crown as representing the public in respect of the revenue, and an individual creditor in right of his private claim, are at issue. For the subject, the cases of *Uppom v. Sumner*, and *Rorke v. Dayrell*, and for the Crown, *The King v. Wells and Alnutt*, and *The King v. Sloper and Allen*, are relied upon as conclusive; and your lordships are constrained to elect by which of these decisions you will abide, for no sophistry of argument can reconcile them.

After the elaborate comment upon these cases, and upon all the authorities applicable to this subject, and upon the principles to be deduced from them, which your Lordships have heard from those who have preceded me, I shall state shortly the reasons which have determined me to prefer the latter judgments delivered by the Court of Exchequer, as containing the sounder exposition of the law, and as resting upon the more solid foundation. Any judgment pronounced by the court in which Lord Chief Justice de Grey presided, assisted by that great constitutional lawyer, Sir William Blackstone, Mr. Justice Gould, and Mr. Justice Nares, presents, upon the first view, the strongest claim to the concurrence of an English lawyer; but I must confess, after weighing the reasons assigned, and the authorities upon which the Court of Common Pleas, in *Uppom v. Sumner*, professes to found its judgment, I cannot yield my judicial assent to it. The whole argument upon the stat. 38 H. 8., as reported in 2 Sir William Blackstone's Reports, is comprised in this single observation, viz. that the former part of the 74th clause is declaratory of the old prerogative law, and the latter a new restriction; so that it shall not take place after judgment

given for the subject. The authorities on which this judgment proceeded are still more unsatisfactory. The case of *Lechmere v. Thoroughgood*, as reported in Comberbach, 123., and 3 Mod. 236., is relied on as the prominent ground of the decision, which, together with the *Attorney General v. Andrew*\*, and the passage extracted from Lord Chief Baron Comyn's Digest, vol. ii. p. 238., viz. "If execution be upon a judgment against the King's debtor, and before *venditioni exponas*, an extent comes at the King's suit; those goods cannot be taken on the extent," are referred to as comprehending the pith and marrow of the law, embodied in this solemn judgment. As to the *Attorney General v. Andrew*, Lord Chief Baron Steel's judgment appears to have proceeded on the ground, that the execution, which was an *elegit*, was perfect, and consummated before the extent issued. Hard. 27. He says, "The subject's title is prior to the King's, and is executed;" and he adds "Stringfellow's case, in Dyer, is unanswerable;" and as to the passage in Lord Chief Baron Comyn's Digest, vol. ii. p. 358., I do not understand him, as throwing the preponderating weight of his own great name into the scale, to guarantee the credit of any decision where he cites cases to support it.

Upon the authority, therefore, of this single case of *Lechmere v. Thoroughgood*, admitted by Mr. Justice Gould to be a little obscure, from being reported only piecemeal and in different books, is built the disputable, or I would rather say, the untenable proposition, that after execution begun, but not completed, the King's extent comes too late.

\* Hardr. 23.

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I have examined with care the several reports of this case, in Comb. 123., 3 Mod. 236., 1 Show. 12., and 2 Vent. 160.; from which it will appear that the action was trespass by the assignees of a bankrupt against the sheriffs of London and others, for seizing goods under a *fiery facias* against the bankrupt, after an act of bankruptcy committed by him.

The act of bankruptcy was committed on the 18th of April, the seizure was on the 29th. After the seizure, an extent issued at the suit of the Crown. The case was twice before the Court; once in Trinity term, 4 Jac. 2., of which 3 Mod. gives the account; and again, 1 W. & M., to which Comberbach and Shower refer. "The Court were of opinion a construction should not be made to make the officer a trespasser by relation, for the taking was lawful at the time."

The question, therefore, as to the right of the Crown to have the extent preferred to the execution, was not the point depending in judgment; and supposing Lord Holt to have said what Comberbach imputes to him, viz. that the extent came too late after the *fiery facias* delivered to the sheriff, it could be regarded only as an *obiter* and extrajudicial *dictum*.

When the same question arose in *Rorke v. Dayrell* as in *Uppom v. Sumner*, Lord Kenyon, after expressing his perfect satisfaction with that decision, relied upon this proposition as the basis of his judgment, viz. that as long as the property of the debtor remained unaltered, and an execution at the suit of the subject, and an extent at the King's suit issue against the debtor, the title of the Crown must prevail; for the point to be con-

sidered, is in whom is the property? He then proceeds to state, that as the property of the debtor's goods is bound by the delivery of the writ to the sheriff, there then remains no property in the debtor on which the prerogative of the Crown can attach.

With great deference to the judgment of so profound a lawyer, I venture to question the soundness of this opinion, preferring the doctrine of Lord Hardwicke, in *Lowthal v. Tomkins*\*, who says, "That neither before the statute of frauds nor since is the property in the goods altered, but continues in the defendant until the execution is executed. The meaning of these words, 'the goods shall be bound by the delivery of the writ to the sheriff,' is, that after the writ is so delivered, if the defendant makes an assignment of his goods, unless in market overt, the sheriff may take them in execution." The same opinion was expressed by Lord Holt, in *Smallcomb v. Cross and Another*†, who says, "If writ of execution be delivered to the sheriff against A., and A. becomes a bankrupt before it be executed, the execution is superseded, and, consequently, the property in the goods is not absolutely bound by the delivery of the writ to the sheriff. But the *teste* of the writ binds against all sales and acts of the party himself." The same point was decided in *Philips v. Thompson*.‡ Lord Kenyon, in the judgment I am commenting upon, says, "The point to be considered is, in whom is the property? I would try it by that test. If the pro-

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\* 2 Eq. Cas. Abr. 881.

† 1 Ld. Raym. 251.

‡ 3 Lev. 191.



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“ perty be not in the debtor, after the seizure and  
 “ before the sale, I would ask in whom is it? The  
 “ debtor may, at any moment before the sale, pay  
 “ the debt, and demand the goods; nor is any  
 “ bill of sale necessary to retransfer the property,  
 “ in order to confirm his title. Suppose the goods,  
 “ whilst remaining in the custody of the sheriff, to  
 “ be consumed by lightning or destroyed by fire,  
 “ or by an armed tumultuary force, would the  
 “ execution be satisfied or the debt discharged?  
 “ surely not.” The judgment of the Court of  
 King’s Bench, in *Thurston v. Mills*\*, furnishes a  
 direct authority upon this point. Goods were  
 taken in execution by the sheriff under a *feri*  
*facias*, and, whilst remaining unsold, an extent,  
 at the suit of the Crown, of a subsequent *teste*  
 issued, under which the sheriff took them, subject  
 to the former seizure, and afterwards sold them  
 under a *venditioni exponas* from the Court of Ex-  
 chequer.. Money had and received was brought  
 by the plaintiff in the original action against the  
 sheriff for the proceeds of the sale. Lord Ellen-  
 borough, in delivering his judgment observes,  
 “ Neither the money nor the goods were origin-  
 “ ally, or at the time of the action brought, the  
 “ property of the plaintiff. The sheriff had, in-  
 “ deed, seized them under a *feri facias*, but the  
 “ plaintiff acquired no property in them by the  
 “ sheriff’s seizure. If they had been burnt in the  
 “ hands of the sheriff the plaintiff would not have  
 “ borne the loss.”

Lord Kenyon concludes his judgment in *Rorke*  
*v. Dayrell* with these words:—“ With respect to

\* 16 East, 254.

" what is supposed to have been said by Lord Mansfield, in *Cooper v. Chitty*\*, of Comberbach, " having mistaken Lord Holt's opinion in *Lechmere v. Thoroughgood*, it is as probable that the report " of that observation is mis-stated."

If Lord Kenyon, before he delivered his judgment in *Rorke v. Dayrell*, had fortunately referred to his own note of *Cooper v. Chitty*, which has since been published by Mr. Hammer, from his Lordship's original manuscript, instead of impeaching, he must have borne testimony to the accuracy of Sir James Burrow's report of Lord Mansfield's judgment in that particular. The notes of Lord Kenyon and of Sir James Burrow on this point are in such perfect harmony, that the one may be considered a *fac-simile* of the other; and I will transcribe them. Lord Mansfield is reported by Sir James Burrow to have said, " That Comberbach, in giving the judgment of the Court, " which is the only sensible part of his whole report, (for it is plain to me that he did not understand the former argument on the former day, " which is the first part of his report of the case,) " agrees with Shower, and says, that the Court " were of opinion that a construction should not " be made to make the officer a trespasser by relation, for the taking was lawful at the time. " But he must be mistaken in the first part of his " report; for Lord Chief Justice Holt could never " say that the property of the goods is vested by " the delivery of the *feri facias*, and the extent " for the King afterwards comes too late. No in- " ception of an execution can bar the Crown."

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\* 1 BURN. 36.

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The following passage is extracted from Lord Kenyon's report of *Cooper v. Chitty*, as published by Mr. Hanmer, page 422.:—"This case of *Lechmere v. Thoroughgood* is reported in two other books. In Comb. 123., the later part of the case is agreeable to that of Shower, that a construction should not be made to make the officer a trespasser by relation. As to the other part of the report, it is manifest to me that he did not understand what they were arguing about; for he makes Lord Holt say what he could never say, about barring the extent of the Crown. In 3 Mod. it is as plain that the reporter misunderstood what passed; for he says the extent came too late, and that the property was bound by the *feri facias*, though the contrary is very clear."

The inference I draw from all the authorities upon the subject, whether the question be considered with regard to executions on statute staple, or to executions at common law by *feri facias* or *elegit*, is this, viz. that the extent of the Crown must be preferred, if the execution be not perfectly executed by the delivery of the land to the creditor, or by the sale of the goods; that the inception of the execution, by the bare seizure of the goods will not bar the Crown; that the execution must be no longer in progress, but completed; and that, until the actual sale, the property is not altered or divested from the original owner.

Mr. Baron Wood, in the elaborate judgment delivered by him in the Court below, and reported in 8 Price, 314., seems, throughout his most able argument, to admit, that, in order to exclude the process of the Crown, the execution of the subject

must be executed; but he insists, that the act of seizure by the sheriff is, for that purpose, a full and final execution. But neither the cases he cites, nor his reasoning to illustrate that position, have succeeded in making me a convert to his opinion. *Curson's Case*\*, cited by that learned Judge, to shew that the prerogative of preference is determined, when the subject's final execution has begun, proves, on the contrary, as it appears to my mind, that it is not determined until the subject's execution is perfect, and consummated by the delivery of the land to the creditor under the liberate.

The only point remaining to be considered, viz. whether the sheriff acquired by the seizure such a special property in the goods as to defeat the process of the Crown, has been so fully discussed by my learned brothers who have preceded me, and to whose judgment I take leave to refer (more especially to my brother Alderson's), as illustrating my view, and incorporating my opinion upon that subject, that I willingly spare your Lordships the fatigue of attending to my examination of it in detail.

That the sheriff is invested with power, as the ministerial officer of the law, to protect the property, whilst remaining in his custody, for the benefit of those who may be entitled to it, cannot be disputed. Against a wrongdoer he may maintain trover or trespass. But from thence, I apprehend, no inference can be drawn unfavourable to the rights of the Crown. He may still be called upon to execute his Majesty's process of extent,

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\* 3 Leon. 239. 4 ib. 10.

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subject to any legitimate claim of property in third persons previously existing and capable of being established.

My brother Alderson has accurately defined the state and condition of such property as being in *custodia legis*: I will, therefore, dismiss this last head of inquiry with an observation of Lord Hobart's, extracted from his judgment in *Sheffield v. Radcliffe* \*, when commenting upon *Stringfellow's case* †, so often referred to. The passage is in these words:—"Stringfellow sued an extent "upon statute staple against Brownsoppe. The "sheriff of Bedfordshire extended the land and "appraised the goods, and seized them into the "King's hands; but, before liberate, an Exchequer "writ for a debt of 100*l.* of the King's, to be "levied upon Brownsoppe, came to the sheriff, who "returned on the writ this special matter into the "Exchequer; and he made the same return into "the Chancery upon the liberate, and that there "was no other goods. Yet he was enforced, notwithstanding the custody of the law, to serve "the King."

For these reasons, I am of opinion that the King's extent is entitled, of right, to be preferred to the subject's execution, and that there is no solid distinction to be made between an extent in chief and an extent in aid.

I fear that I have rendered myself obnoxious to the imputation of trespassing too largely upon your Lordship's valuable time. My apology for doing so may be found in the importance and difficulty of the subject, which has, for so many years, been

\* Hob. 399.

† 1 Dyer, 67.

considered in Westminster Hall a *verata questio*, distracting and dividing the opinions of the most enlightened Judges. If the judgment which I have humbly submitted to your Lordships be deemed erroneous, I shall, at least, have the consolation of reflecting that I am under the shade of great authority: "*Magno se iudice quisque tuetur.*"

Gaselee J. — My Lords, I have the misfortune to differ in opinion from those of my brothers who have preceded me, and, I understand, from a great majority of those who are to succeed me in addressing your Lordships upon this occasion: and when I understand that the two noble and learned Chief Justices to whom this case was referred, upon a writ of error brought to revise a judgment which was given in the Court of Exchequer in favour of the Defendant in error, having reported to the Lord Chancellor that the question was one which has agitated the Courts of Westminster Hall for a great many years; — that there had been a difference of opinion in the Courts of Westminster Hall; the Court of King's Bench, in one case, and the Court of Common Pleas having decided that the extent was not entitled to priority over the execution, at the suit of the subject; — that the Court of Exchequer has uniformly decided the other way, viz. that the extent was entitled to priority; — and that their Lordships, having heard the case argued, and considered it very maturely, had not been able to come to a decision upon the subject, and to agree upon what advice they should give to the Lord Chancellor; I am a little surprised that so considerable a majority of the Judges

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should have formed an opinion adverse to that which is the result of the best consideration I have been able to give to the subject.

The first question propounded by your Lordships for the consideration of the Judges, branches out into two, viz. 1st, Whether the property is altered by the seizure of the sheriff, under the writ of *feri facias*; and, 2dly, Whether the statute 33 H. 8. c. 39. s. 74. abridges the prerogative process of the Crown, and prevents it from taking effect, unless it be issued antecedently to the subject's execution, or, in the words of the statute, unless the King's suit be taken and commenced, or process awarded for the debt, at the suit of the King, his heirs or successors, before judgment given for the said other person or persons. In considering the first of these questions, I would call to your Lordships' attention, that the question in this case is not, as in many of the cases in which the decision has been given by the Court of Exchequer in favour of the Crown, Whether the claimant has such a property in the goods as to enable him, according to the technical practice of the Court of Exchequer, to come in and claim the property under the usual rule, upon the return of the writ and inquisition into the Court: in which case, no one can be allowed to traverse the King's title, without shewing title in himself. But here the question is generally, Whether the writ shall be executed by the sheriff by extending the same goods into the King's hands, and selling them to satisfy the Crown debt, without regard to *feri facias* under which he had first seized them. It is admitted, and, indeed, after the decision in

*Swain v. Morland* \*, it is too late to deny, that, after an execution is once *executed* at the suit of a subject, an extent coming to the sheriff on the part of the Crown, to be executed on the same property, comes too late. One question, therefore, on this part of the case is, at what time may an execution be said to be executed? Now, my Lords, there are many authorities which lay it down, that by the seizure (the sale being but the formal part of the execution) the property vests in the sheriff. The first authority I shall trouble your Lordships with on this point, is the opinion of Lord Holt, in the case of *Lechmere v. Thoroughgood*, reported in several books, and, amongst others, in Comberbach 128., in which Lord Holt is stated to have said, "The property of the goods is vested "by the *delivery* of the *fieri facias*, and the extent "afterwards for the King comes too late, and that "on the Statute of Frauds and Perjuries." It is true, the case does not appear to have been decided upon that ground, but because the taking being lawful at the time, the officer could not be made a trespasser by relation; and that Lord Mansfield, in *Cooper v. Chitty* †, says, that the reporter must be mistaken in the first part of his report: but in 4 T. R. 142., Lord Kenyon is stated to have said, with respect to what is supposed to have been said by Lord Mansfield in *Cooper v. Chitty*, of Comberbach having mistaken Lord Holt's opinion in *Lechmere v. Thoroughgood*, "It is probable that the report of that observation is mis-"stated." And in the banker's case ‡, Lord Holt says, so soon as a *fieri facias* is delivered to the

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\* 1 Bro. & Bing. 370. 3 B. Mo. 740.

† 1 Burr. 36.

‡ 11 State Trials, 144., in 8vo. edit., 14 vol. 38.



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sheriff, and upon it goods are levied, the property of the goods is altered, and the sheriff becomes a debtor to the plaintiff. The case of *Clark v. Withers*\* is also to the same effect. That case is as follows:— F. Dives, as administrator of J. Dives, recovered 303*l.* against Clark, upon a bond to his intestate, upon judgment by default in the Common Pleas, and sued out a *fiery facias*, tested of Trinity Term, 1st Ann, returnable in Michaelmas Term, directed to the sheriffs of London, which was delivered to the sheriff on the 1st of August in the same year, who on the same 1st of August seized goods to the value. F. Dives the administrator died on the 9th of September following. The sheriff returned the seizure to the value, *sed remanent, &c. pro defectu emptorum*. On the 29th of September, the sheriff was removed and another put in. Defendant Clark now sued out a *scire facias* against the then sheriff for restitution of his goods, and upon demurrer judgment was given against the plaintiff in the Court of Common Pleas, and he then brought a writ of error. And now, the case having been twice solemnly argued at the bar, the Court *seriatim* affirmed the judgment. Mr. Justice Gould says, “ The execution is executed in the life of the “ administrator, and the sale, viz. the formal part “ of it, may be done by the same writ. The “ sheriff by the levying the goods by a *fiery facias*, “ as he seizes the goods gets a property in them “ against all persons, and may have trespass against “ the true owner, if he gets them : and so he may “ have trover, as appears in *Wilbraham v. Snow* †, “ where Kelynge C. J. held that he gains a *general* “ property, but all the rest say, that it was only

\* 6 Mod. 290.

† 2 Saund. 47.

“ a special property, so as to sell, &c. This is not  
 “ like the case put before of an extent, for in that  
 “ case, there must be a liberate, which is by award  
 “ of the Court.” Mr. Justice *Powys* says, “ This  
 “ execution is so far completed that it is a vesting  
 “ of the property in the sheriff. The selling is but  
 “ a formal part of the execution, and by the  
 “ seizure and writ he has authority to sell, and  
 “ the *venditioni exponas* adds not to his authority,  
 “ but is to spur him on to sell.” And Mr. Justice  
*Powell* says, “ *Execution is an entire thing*; and  
 “ therefore, where a sheriff levies goods, and while  
 “ they remain in his hands for sale, a new sheriff  
 “ is chosen, he who began the execution shall go  
 “ on with it, and sell the goods, and not deliver  
 “ them over to the new sheriff, who is the officer  
 “ of the Court. The reason is, that execution is  
 “ one entire thing (Year Book, 34 H. 6. pl. 36.),  
 “ and therefore, where it began it shall end: and  
 “ that is the reason that a *supersedeas*, after  
 “ execution begun, shall not supersede it upon a  
 “ writ of error, because it is an execution from  
 “ the first levying of the goods, and not like the  
 “ case of an *extendi facias*, because the extent is  
 “ only a seizure into the King’s hand, and there  
 “ must be another award of the Court, viz. a liber-  
 “ ate to deliver them over to the plaintiff.” *Holt*  
*C. J.* said, “ It is true, after he has seized goods  
 “ to the value of the debt, though he be out of  
 “ office, yet he is bound to make sale of the  
 “ goods, and to make a return; and when he has  
 “ made a return of a seizure of the goods, and  
 “ that they remain in his hands for want of  
 “ buyers, that is not a discharge of the command  
 “ of the writ, but only an excuse that he has not

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“ the money, and he is compellable by law to  
 “ bring it in : and though a *venditioni exponas* does  
 “ lie, yet a *distringas* is the proper remedy. And  
 “ there are two sorts of *distringas nuper vicecom.*  
 “ before mentioned (Year Book, 34 H. 6. pl. 36.) :  
 “ the one a *distringas* to the new sheriff to distrain  
 “ the old one to sell the goods, and bring the  
 “ money into court ; the other, to distrain him to  
 “ sell *et denarios inde provenientes*, to deliver to  
 “ the new sheriff to bring into Court. Now, if a  
 “ *distringas* lies for the new sheriff to compel the  
 “ old sheriff to sell, that shews the old sheriff has  
 “ an authority to sell by virtue of the former  
 “ writ ; and that which commands the new sheriff  
 “ to distrain the old one to sell and bring in the  
 “ money is the most usual : (Rastell’s Ent. 164.  
 “ Thesaur. brev. 90.) Now then, since the sheriff  
 “ is compellable to sell, having seized the goods,  
 “ what should hinder, in this case, that he should  
 “ not sell, notwithstanding the Plaintiff’s death ;  
 “ for the writ is as forcible and compellable upon  
 “ them to levy and bring in the money, as if the  
 “ Plaintiff had lived. When he seizes the goods  
 “ by virtue of the writ, the Defendant is actually  
 “ discharged, though they are not sold ; for the  
 “ Plaintiff must depend upon his execution, and  
 “ rely upon that : and he has no farther remedy  
 “ against the Defendant, but altogether against  
 “ the sheriff. This came in question upon an  
 “ ejectment brought by an administrator *de bonis*  
 “ *non*, and it was held that the extent was void,  
 “ for the writ was abated ; and no matter whether  
 “ the Plaintiff died before the return of seizure or  
 “ after. But in case there be no act of the Court  
 “ to be done, but an *elegit* sued out, which com-  
 “ mands the sheriff to deliver the lands extended

“to the party, if there the executor or administrator die after the inquisition, and before the delivery, in that case the death of the Plaintiff shall not avoid the execution; and that appears by the case of *Harrison v. Bowden*\*, though not so very plain.” If he do not sell between the *teste* and return of the distringas, he shall forfeit issues; and after goods once seized, no writ of error or supersedeas shall stay the sale. In *Wilbraham v. Snow*†, the point decided was, that the sheriff may maintain trespass or trover against any person who takes away goods which he has seized in execution: *Mildmay v. Smith*.‡ And by seizure of the goods in execution, *the sheriff has property* in them, so that he may reseize them, and sell them, as well when he is out of office as before. In the case of a *fieri facias* there is no further act to be done. Although the terms of the writ direct the sheriff to bring the money into Court, to render to the Plaintiff, it is not necessary he should do so. He not only may pass it over himself to the Plaintiff, but in the case of *Perkinson v. Gifford*§, it is said, an action of debt may be maintained against him or his executors, if he does not do so after he has sold the goods.

It is true that various authorities have been cited on the other side, and amongst others, *The King v. Peck*. || In that case a *fieri facias* issued out of the Court of Common Pleas at the suit of

\* 1 Sid. 29.

† 2 Saund. 47.

‡ 2 Saund. 344. In this case it was determined, that if a sheriff suffers goods seized under an execution, and returned by him of a certain value, to be rescued out of his hands, a *scire facias* lies to have execution against him of the money according to the value returned.

§ Cro. Car. 539.

|| Bunbury, 8.

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Roberts against Peck, which was tested on the 3d of April, by virtue of which the sheriff levied the goods, &c., but before the sale thereof, or the return of the writ, an extent came to the sheriff, at the suit of the Crown, to levy the goods, &c. of Peck, tested the 2d of May. The sheriff returned this special matter on the *feri facias*, and likewise upon the extent, into the Court of Exchequer, on which it was said that Peck *fuit possessionatus* of the goods on the 30th of April: upon which Mr. A. moved to quash the inquisition, and Mr. F. moved that the sheriff might amend his return. Baron Price was for quashing the inquisition, which, being found by a jury, he did not see how the sheriff could amend it. The Lord Chief Baron Bury and Baron Montague were of opinion that the sheriff might amend his return, and an order was made for that purpose; which was what the sheriff wanted, to indemnify him in case any thing had been moved against him in the Common Pleas on the return of the *feri facias*. There is a note to that case in these terms. N.B. It was taken for granted that, though the goods were levied by virtue of the *feri facias*, three days before the *teste* of the extent, yet that was no bar to the Crown. But, query if they had been sold? for then execution had been executed.

*Stringfellow's Case* has also been very much relied upon, on this part of the case, as an authority on the part of the Crown. That case is thus reported in Dyer, 97.: — *Stringfellow v. Brown-soppe*, 3 Ed. 6. 1 Dyer, 67. b. One Stringfellow sued a writ of *extendi facias* out of Chancery to have execution of a statute staple against Brown-soppe, directed to the sheriff of Berks, who made

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extent of the lands of Brownsoppe, and took his goods accordingly into the hands of the King, according to the writ, but did not make livery: and afterwards a writ of the King's prerogative issued out of the Exchequer, reciting the prerogative which the King ought to have to be first served and paid by his debtors, and commanded the sheriff to levy the debt to the King which Brownsoppe owed him for 100*l.* of the goods of the debtor; and if he have not sufficient, then to extend the land. And this writ was delivered to the sheriff after the day of the return of the first writ: but the first writ was not returned at the day, and the sheriff returned this special matter upon the writ of the Exchequer, and that he had returned the writ into Chancery, served as above, and averred in his return that the debtor had no goods or lands to be extended besides the goods, chattels, lands and tenements above extended. And it was holden in the Exchequer for law, that the sheriff should be amerced if he would not amend his return, viz. return the extent into the Exchequer, for the service of the King's debt; and Justices Hale and Bromley were of the same opinion, because the property of the goods and land were not in Stringfellow before they were delivered to him by the writ of liberate. The distinction, however, between that case and the case of a *feri facias*, has not only been very fully pointed out in the opinion of some of the Judges, in the case of *Clark v. Withers*, above-cited; but the case is also very pointedly observed upon by Mr. Baron Wood, in his opinion on the case now in judgment, in 8th Price, 314. It is, that the extent is not the execution, and gives no

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authority to the sheriff to sell or deliver over to the party. It merely authorizes the sheriff to seize the property, but not to do any thing with it until the liberate issues, which is, in fact, the execution. The *fieri facias* commands the sheriff to make the money of the goods; and no further authority is requisite to empower the sheriff to sell, and to pay the money over to the Plaintiff. This distinction is also shewn in *Playne's Case*, in Cro. Eliz. 47. A lessee for years was obliged to pay his rent. In debt upon it he pleaded, that the lessor was bound in a statute; and upon that an *extendi facias* was awarded, to seize the lands and tene-ments of the lessor into the Queen's hands, which was executed accordingly: and upon that a liber-ate was awarded; and in the mean time, between the *extendi facias* returned and liberate awarded, the rent was incurred for which he was chargeable to the queen, and demands judgment. The opi-nion of the whole court was clear to the contrary. Before the liberate awarded *nihil operatur*, for he remains always tenant to the lessor, and charge-able to him for the rent; and the writ before is but of form, when it speaks of the seizing into the Queen's hands; for it was never seen that lands were seized upon that writ. So that here, upon an *extendi facias*, it is clearly held, that no-thing was divested out of the debtor until the liberate. In *Smallcomb v. Cross*\*, which has been cited on the part of the Crown, there is the fol-lowing note:—In this case Mr. Northey said, *arguendo*, that it is the common practice at this day, that if a *fieri facias* be delivered, and the

\* 1 Lord Raym. 251.

goods appraised and *sold*, and the writ is not returned, and an extent for the King comes out of the Exchequer, it will overreach the former sale; but, *per Curiam*, it is a very dangerous practice. It is now, however, admitted that the *sale* would bar the Crown, and I only mention this note, to shew how far the argument has in earlier times been carried in support of the alleged rights of the Crown. A passage at the end of the case of *The Attorney-General v. Capel*\* was also cited on the other side, viz.: — “Extents have been held good “that have been upon goods actually levied by “virtue of a *feri facias*, and in the sheriff’s custody, the extent coming before a bill of sale “made, so as the property was not altered.” This passage does not appear to be part of the judgment of the Court in *The Attorney-General v. Capel*, in which the question was, whether the extent was too late, coming after a commission of bankruptcy, but before the assignment. There is nothing in the case warranting, or in any way calling for the observation, which, as Mr. Baron Wood says in his judgment, was a mere gratuitous dictum of the reporter of that case. The result of a due consideration of the foregoing cases seems to me to be, that the property is *altered*, and the Crown barred, by the levy under the *feri facias*. It is not necessary to go the length of shewing that the sheriff has the *general* property in the goods. There are several cases which shew, that where the general property remains in the debtor, yet, if another has any special property in, or lien upon the goods, the Crown shall not take the

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\* 2 Show. 480.



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goods but subject to that lien. Thus an equitable mortgage which binds the Crown, and against which the Crown is entitled only upon satisfaction of the lien of the mortgagee to its full extent, *Casberd v. The Attorney-General* \*; or the lien of a factor who has accepted bills to the amount of the value of the goods consigned to him, *The King v. Lee* †; or of a wharfinger, on the goods of his customer in his possession, for his general balance, which has been decided to be available against the Crown, *The King v. Humphrey*. ‡

In Mr. West's Treatise on Extents, p. 98., he says, the plaintiff in an execution may be said to have an interest in goods which have been taken under an execution, the goods being in the custody of the law, and the sheriff having the special property in them, the general property remaining in the defendant under the execution. But it is said that that rule cannot apply to the case in question, because, at any time before sale, and after seizure, the debtor may, by payment of the debt, suspend the sale and stay execution. The same answer would apply to the case of the factor, wharfinger, or other persons above-named in all which the debtor, upon payment of the debt, regains the property.

If the decision on this part of the case is in favour of the Plaintiff in error, the remaining question will not arise; but if not, I am of opinion that the statute 33 H. 8. c. 39. s. 74., abridges the prerogative process of the Crown, and prevents it from taking effect in this case, the King's suit not having been taken or commenced, or process awarded

\* 6 Price, 411. † 6 Price, 362. ‡ 1 M'Clell. & Y. 173.

at his suit, before judgment given for the Plaintiff in the *feri facias*. The following are the words of that section : — “ And be it also enacted, by the “ authority aforesaid, that if any suit be commenced “ or taken, or any process be hereafter awarded for “ the King for the recovery of *any* of the King’s “ debts, that then the same suit and process shall be “ preferred before the suit of any person or persons : “ and that our said sovereign Lord the King, his heirs “ and successors, shall have first execution against “ any defendant or defendants of and for his said “ debts, before any other person or persons ; so “ always that the King’s suit be taken or commenced, or process awarded, for the said debt of “ our said sovereign Lord the King, his heirs or “ successors, before judgment given for the said “ other person or persons.”

Before proceeding to the further consideration of this part of the case, I would call your Lordships’ attention to the fact, that so far from the King’s suit being taken or commenced, or process awarded before the judgment was given for the subject, the debt was not due to the King, but to the debtor of the King’s debtor, and was not put on the record until after the giving the judgments, the issuing of the *feri facias*, and the actual seizure of the goods under it. In the case of *The Attorney-General v. Andrews*\*, it was determined by all the Court, that the statute did abridge the prerogative. The case was, Sir William Harrison acknowledged two judgments in debt to one Andrew upon bond, and was bound to one Fielder, on a bond bearing date before the judgments. Fielder

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\* Hardres, 23.

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assigned his debt to the King: Andrew takes out execution upon his judgments, viz. two elegits. By one he has a moiety, by the other the other moiety of Sir W. Harrison's lands extended. Then process issued out of the Exchequer for the debt assigned to the King, and the principal question was, whether or no the King should be preferred in this case. After argument, the Court, in Trinity Term, 1665, gave judgment for the defendant. Baron *Parker* said, "The King has many prerogatives *pro bono publico*; but in the case in question, the statute of 33 H. 8. abridges the prerogative, and controls the common law. Affirmative statutes do not alter the common law, but negative statutes do; and here is a negative implied. *Vide Dyer, Stringfellow's Case, 3 Eliz. Dyer in Casse's Case.* Baron *Nicholas*, according to *ant.*—Before the statute 33 H. 8., the King was not bound; but the statute has made an alteration, though it sounds in the affirmative; for it enacts a new thing, and *ita quod* makes a condition precedent, and a limitation." He then refers to certain authorities, as shewing how such statutes are to be expounded, and the clause would else be idle. The Chief Baron *Steele* said, "The subject's title is prior to the King's, and is executed. The words of the statute of 33 H. 8. are introductive. *Cecil's Case* \* and *Stringfellow's Case* are unanswerable." It is observable, that although so much stress is laid upon *Stringfellow's Case* on the part of the Crown, on this occasion, both Chief Baron *Steele* and Baron *Parker* in the above case of *The Attorney-*

\* 7 Rep. 18. (b)

*General v. Andrew*, cite it as conclusive in favour of the subject. The case of *Uppom v. Sumner* \* is precisely the same as the present. Uppom, the plaintiff, in Easter Term 17 G. 3., recovered a judgment against Cann in the King's Bench in debt for 1020*l.*, and on the 16th of April, 1777, sued out a *feri facias* returnable Monday next after the morrow of the Ascension, 12th of May; a warrant on which was on the 18th of April, delivered to the officer, who on the same day took the goods, and kept possession of the same, by virtue of the warrant. On the 24th of April, before any sale of the goods, an extent was sued out and delivered to the sheriff against the goods of Cann, to levy 621*l.* 4*s.* 9*d.*, a debt to the King; and a warrant was on the same day delivered to the same officer, who then had the goods in his possession, under the former warrant, and who, two days after, had the goods appraised, and on the 30th of April, took an inquisition on the extent. The plaintiff Uppom's attorney attending and putting in his claim, the goods were sold on the 23d of May, and the sheriff being called upon by Uppom to return the writ, returned *nulla bona*. When the cause was first called on, the plaintiff's counsel thought they could not support their case, and accordingly judgment was given without argument. It was, however, afterwards argued, and after time to consider, Gould J. delivered the unanimous opinion of De Grey C. J., who was present at the argument, himself, Blackstone, and Nares Justices, that in this case the extent did not take place of the execution, the King's suit being

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\* 2 Black. 1251. and 1294.

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commenced after the judgment. It had been contended in argument by Mr. Serjeant Grose, who afterwards was one of the Judges, and agreed with the rest of the Court in the judgment in *Rorke v. Dayrell*, that the statute H. 8. only restricts the prerogative in the particular Revenue Courts erected by and mentioned in that act. But in giving judgment, Mr. Justice Gould, after stating the particular parts of the act, says, "About seven sections only, viz. sections 50. 74, 75, 76, 77, 78. and 80., contain general provisions extending to all the King's subjects, and are applicable to all the King's Courts, as well as to the Courts of Revenue, where the subjects of them fall under consideration. Indeed," he says, "it would have been absurd to have one law prevail in the King's Bench and Common Pleas, and another in the Exchequer and Duchy with regard to such questions as the present, the priority of the King's debts before those due to a subject." The learned judge, after stating the 74th section of the act, says, "The former part of this clause is declaratory of the old prerogative law; the latter is a new restriction of it, so that it shall not take place after judgment given for the subject."

With respect to the case of *Lechmere v. Thoroughgood*, upon which so much has been said, he says, "In *Lechmere v. Thoroughgood* it appears, by Comb. 123. and 3 Mod. 236., that first Herbert and then Holt were clearly of opinion, that after execution begun, but not completed (and, of course, after judgment signed), the King's extent came too late. This case is a little obscure, arising from its being reported only piecemeal, and in different books. But with some

"attention, it will be found to be clear and consistent, by reading the several parts of it in order of time, as they occur, viz. the pleadings, 2 Jac. 2., 2 Vent. 159.; 1st argument, 4 Jac. 2., 3 Mod. 236.; 2d argument and judgment, 1 W. & M. Comb. 123.; 1st Show. 12., and a subsequent action between the same parties in effect in the Common Pleas, viz. *Lechmere v. Toplady*, 1 Vent. 169., 1 Show. 146." In *The Attorney-General v. Andrew*\*, it was held by the Court of Exchequer, that where there was a judgment and an execution by elegit, a debt of the King prior to the judgment, but the process thereon sued out after it, should be postponed to the judgment. And from these authorities Lord Chief Baron Comyns in his Digest collects this doctrine, that if execution be upon a judgment against the King's debtor, and before *venditioni exponas* an extent comes at the King's suit (which is the very case at bar), those goods cannot be taken on the extent. And this opinion is also supported by *The King v. Dickenson*, 1692., reported by Sir Thomas Parker, 262.

The case of *The King v. Dickenson* was this, A. was indebted by judgment to B., and by bonds to C. and D., and by simple contract to E., and died. E. being a debtor to the King, caused the debt due to him to be seized into the King's hands; and upon this a *scire facias* issued against Dickenson, executor of A.; and before the return of it C. and D., the bond creditors, obtained judgment; and then Dickenson pleaded to the *scire facias* the judgment prior, and the subsequent judgments. The Attorney-General demurred. The points

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\* Hardr. 23.

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argued in Hilary Term, 1691, were, first, whether the subsequent judgments should be preferred to the King's debt, for it was admitted that the precedent judgment should be preferred. The second it is unnecessary to state. The case was adjourned to Easter Term, 4 W. & M. 1692, when it was adjudged for the King, that his debt should be preferred before the subsequent judgments, viz. before any bond, Hardr. 23. ; but that a precedent judgment should be preferred before it, upon the words of the 26th section of the statute of 33 H. 8. c. 39. ; "So always that the King's suit be taken " and commenced, or process awarded for the debt " of the King, before judgment given for other " persons."

In *Rorke v. Dayrell*\*, the plaintiff had obtained a judgment in Hilary Term, 1787, against Clark, for 727*l*. On the 5th of January, 1788, the plaintiff sued out a *fiery facias*, tested on the 28th of November, 1787, returnable on the 12th of February, 1788. The writ was delivered to the sheriff on the 7th of January, 1788, who, on the 8th, seized the goods.

Before the sale, viz. on the 11th of January, 1788, a writ of extent, tested that day, issued out of the Exchequer on a bond to the Crown, under the seal of Clark, dated the 5th of April, 1782, for 300*l*. payable at a day before the issuing of the *fiery facias*, and then unpaid. On the 12th of January the extent was delivered to the sheriff. The sheriff acted under the extent, and returned *nulla bona* to the writ of *fiery facias*. The case was argued upon the stat. 33 H. 8. c. 39. s. 74. The court were

\* 4 T. R. 402.

unanimously of opinion the extent was too late. *Lord Kenyon* says, "Where the King and a subject stand in equal degree, there is no doubt but that the King's prerogative must prevail; and therefore, where the property in the goods remains in the King's debtor at the time, and an execution at the suit of the King, and another at the instance of a subject, are sued out, the former will be preferred. On this principle the case of *The King v. Cotton*\* proceeded. That was not the case of an execution, but a distress. The goods taken were *in custodia legis*, as a pledge to answer the demand of the landlord, and the property in the goods was not divested out of the tenant. Now, in this case the sheriff had actually seized the goods under the Plaintiff's writ of execution; and an execution once begun shall proceed; it shall not stop on the issuing of a commission of bankrupt against the debtor. And in this respect, I know no distinction between the case of the Crown and that of a subject. As to the statute 33 H. 8. c. 39. s. 74., either it did or did not give some new privilege to the Crown. If the counsel for the Crown contend that it did, they must take the word execution as referring to personal chattels; and then the words are against the King, because here there was a judgment for the Plaintiff. If it did not introduce some new benefit, then the Crown must be referred to its ancient prerogative, which only extends to the case I stated at first; namely, when the King and a subject stand in equal degree, and the property is not altered,

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\* Parker, 112.



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“there the former shall prevail. With respect to  
 “what is supposed to have been said by Lord  
 “Mansfield, in *Cooper v. Chitty*, of Comberbach  
 “having mistaken Lord Holt’s opinion in *Lech-*  
 “*mere v. Thoroughgood*, it is as probable that the  
 “report of that observation is mis-stated.” *Ash-*  
*hurst J.* says, “the case of *Uppom v. Sumner*  
 “certainly underwent a great deal of consider-  
 “ation before it was decided. All the prior autho-  
 “rities were thoroughly examined at that time.  
 “Unless, therefore, it could be shewn that that  
 “case proceeded upon wrong principles, it ought  
 “to govern the present. The words of the statute  
 “H. 8. are clear and decisive that the King’s suit  
 “shall be preferred to that of any other person :  
 “So always that the King’s suit be taken or com-  
 “menced, or process awarded, before judgment  
 “‘given for the said other person or persons.’  
 “Now this act of Parliament gave a new preroga-  
 “tive to the King, in various instances, which he  
 “had not before. By that he is enabled to issue  
 “immediate execution in cases where he could  
 “not before; for before *he had only a right to such*  
 “*execution when the debt was upon record.* And,  
 “as this was a new prerogative, the legislature had  
 “a right to restrain him; and they have, in ex-  
 “press terms, restrained him where the subject’s  
 “judgment is prior to the inception of the King’s  
 “execution.” Mr. Justice *Buller* says, “this case  
 “arises on the statute 33 H. 8., for before that  
 “statute the Crown could not issue immediate  
 “execution on a bond debt; though the cases  
 “that have already happened on this statute shew  
 “that the act is not to be confined to bond debts  
 “only, but that it extends to all debts and execu-

tions: it is so stated in express terms by Lord Coke in *Sir T. Cecil's Case* \*. If this act of Parliament be restrictive on the Crown, it goes a great way to determine this question: for if it be, it expressly requires that the King's suit shall be commenced before judgment is given for the subject. Now that was expressly decided in the case in Hardres, where the whole Court were of opinion that the statute does abridge the King's prerogative; and there Chief Baron Steel said, 'the subject's title is prior to the King's, and is executed.' On this ground I put the question to the counsel in argument, '*What effect a judgment obtained by a subject would have, where he lay by till the King's extent were executed?*' I am inclined to think that in such a case the execution by the subject would be postponed; but it is not necessary to decide that point in the present case. As to the effect of the statute 33 H. 8. c. 39., it is impossible to have a more direct authority for the restriction on the King's prerogative than that in 7 Rep. 19. b., where it is said that, 'The act hath given a benefit and advantage to the King, 1st, In making every bond made to the King in nature of a statute staple; 2dly, In giving remedy to the King himself, for obligations made to others to his use; 3dly, To recover costs and damages; 4thly, In suing of execution for all his debts; 5thly, In charging the issue in tail, and the heir who hath the land, of the gift of his ancestor; and therefore it was the intent of the act to gratify the subject, that where a new

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\* 7 Rep. 18. b.

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“ ‘ provision was made for the levying the King’s  
 “ ‘ debt in a more speedy and beneficial manner  
 “ ‘ than the King had before, the subject also  
 “ ‘ should have some new benefit which he had not  
 “ ‘ before. Now that new benefit was to give him  
 “ ‘ a preference in cases where his judgment was  
 “ ‘ obtained before the extent of the King issued.’ ”  
 Mr. Justice *Grose* says, “ the simple question is  
 “ this, whether the King’s right of issuing an ex-  
 “ tent upon a bond supersedes a prior judgment of  
 “ a subject. If the Crown have such a right, it  
 “ must arise upon the statute 33 H. 8. c. 39. s. 74.,  
 “ Gilbert’s History of the Exchequer, 165. Now  
 “ the words of this clause in the act are extremely  
 “ pointed, to shew, 1st, What the King’s prero-  
 “ gative was before ; 2dly, How far the preroga-  
 “ tive was intended to be assisted in these cases,  
 “ and how far to be limited. But it is said that  
 “ ‘ Execution’ in this act was intended only to  
 “ affect lands : but there is no reason why it should  
 “ be so confined. It must mean every kind of exe-  
 “ cution to which the King was intituled before the  
 “ passing of this act, otherwise the King would be  
 “ bound in cases where he had a prerogative be-  
 “ fore. Thus this case stands on the words of this  
 “ statute. The authorities also are decisive. First,  
 “ the case in *Hardres* is very pointed ; and there it  
 “ was not even hinted that execution in this act  
 “ ought to be confined to an execution against  
 “ land. Then came the case of *Rex v. Dickenson* ;  
 “ and Lord Chief Baron Comyns\* drew this con-  
 “ clusion from the cases, that if execution be upon  
 “ a judgment against the King’s debtor, and before

\* 2 Com. Dig. 538. 648. (G. 8.)

"a *venditioni exponas* an extent comes at the King's suit, those goods cannot be taken upon the extent. Therefore, as well on the decisions as on the construction of the statute 33 H. 8. the Plaintiff is entitled to recover."

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After the decision of these two cases of *Uppom v. Sumner* and *Rorke v. Dayrell*, came the case of *The King v. Wells and Allnutt* in the Court of Exchequer, which, as to the point upon which the Court delivered their judgment (for there was another on which the case might have been put), was precisely similar to the present. The Court of Exchequer gave judgment for the Crown; and such has been the practice of that Court ever since. The judgment of Lord Chief Baron Macdonald is stated in a note in 16 East, 274. That case, however, was principally founded upon the case of *The King v. Cotton*\*, the principle on which that case was so decided being stated in the judgment of the Lord Chief Baron in the *King v. Wells and Allnutt*. to be, that if the King's execution bore *teste* before the property was altered, it bound that property. The case, however, of *The King v. Cotton* arose upon a distress, and not upon an execution, which, I apprehend, as it is stated by Lord Kenyon in his judgment of *Rorke v. Dayrell*, makes a material difference; the sheriff, in the case of seizure under an execution having, in my judgment at least, a *special property* in the goods. In the case of *The King v. Wells and Allnutt* the Lord Chief Baron relied much on *Stringfellow's Case*, the difference between which and the present case I have already pointed out, viz. that in that case the liber-

\* Parker, 112.

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ate is the execution, and was not issued until after the issuing of the Crown process. The question was afterwards brought before the Court of King's Bench, in *Thurston v. Mills*\*, and twice argued; and the Court were prepared to give their judgment: but on the day on which it was to have been given, they suggested a doubt as to the form of the action, and directed a third argument upon that point only, upon which they gave their judgment against the Plaintiff. What the judgment was which the Court was prepared to give upon the general question, it is impossible to say. It is not probable that it was in favour of the defendant, or, at least, not unanimously so; for, if so, as that would probably have put the question at rest for ever, it is not likely the Court would have raised another question, and given their judgment upon the question so newly raised. With respect to the observation which has been made, that if the statute is to be construed literally, the Crown would be in a worse situation than the subject, if the King's suit must be commenced before judgment given for the subject; for then, if the subject's judgment be first, he would have precedence though his execution were last, which is not the case even between subject and subject; I apprehend the true answer to that observation is what was suggested by Mr. Justice Buller in his judgment on *Rorke v. Dayrell*, but thought it unnecessary to decide on that particular case, viz. that in case of laches or delay on the part of the subject, an execution would be postponed. I believe, upon looking to the writ of extent itself, it will appear by the terms of it that it is issued by

\* 16 East, 274.

virtue of this statute. Without trespassing further, therefore, upon your Lordships' time, my humble answer to your Lordships' questions, is, 1st, That this writ of extent shall not be executed by the sheriff by extending the same goods, seizing them into the King's hands, and selling them to satisfy the Crown's debt, without regard to the writ of *feri facias*, under which he had first seized them. And, 2dly, That all other things remaining the same, it makes no difference whether the extent was in chief or in aid.

*Littledale J.* — The question is, Whether under the particular circumstances of this case, the execution of the Crown, or that of the subject, is to prevail? Connected with these questions, the case of *Uppom v. Sumner*, in 2 Blackst. 1251. and 1294, came before the Court of Common Pleas in 1779, and was decided against the Crown. *Rorke v. Dayrell*, 4 Term Rep. 402., afterwards came before the Court of King's Bench, and was also decided against the Crown. Then *The King v. Wells and Allnutt* (in the notes, 16 East's Rep. 278.) came before the Court of Exchequer, and was decided in favour of the Crown. After that, *Thurston v. Mills* (16 East's Rep. 254.) came before the Court of King's Bench, in order to have the question settled; but, after hearing the case argued twice, upon the principal point, it went off on a point of form, that an action for money had and received would not lie; and therefore the question remained as it was. As no opinion was delivered, it is immaterial to enquire, or conjecture, what the opinion of the judges was. After that, *The King v. Sloper and Allen*, 6 Price, 114, came before the Court of Exchequer; and the Court there acted upon the

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case of *The King v. Wells and Allnutt*, in favour of the Crown,

In this case, an information in the nature of an action for a false return was filed; and after judgment for the Crown in the Court of Exchequer, the Court of Error, after it had been twice argued, determined that an information for a false return would not lie; as the return was true in fact, though false in law.

In giving my opinion, I shall not consider whether the Judges on these occasions were more or less competent to decide them, from having filled one situation or another; or whether any of them laid too much or too little stress upon former authorities. Such a discussion would protract the case into a very great length, without any beneficial result. The present case is brought forward to settle the law, where there have been contrary decisions; and I shall consider the case as it would have stood, if none of these later cases had occurred. In ascertaining what is the King's prerogative, two questions arise: — First, as to its extent independently of the statute 33 H. 8. c. 39.; secondly, upon the effect of that statute. The Crown, by its prerogative, has some privileges and advantages by the common law beyond what a subject has; and a reason for this is given in Gilbert's History of the Exchequer, p. 90.: — “Because the public  
“ought to be preferred to the private property;  
“and the rather, because the King is supposed, by  
“public business, not to be able to take care  
“of every private affair relating to his private re-  
“venue, and, therefore, no time occurs to the  
“King; and if he was to be prevented of his ex-  
“cution by another person coming in before him,

“ laches must be imputed to him, which the law does not allow.” And in Co. Litt. 131. b., Lord Coke gives as a reason, “ that *thesaurus regis est fundamentum belli et firmamentum pacis.*” And, there is no doubt, that where the King and subject stand in an equal degree, the King’s prerogative must prevail. One of the advantages which the King had, was, by giving protections to his debtor, that he should not be sued or attached till he paid the King’s debt. But, inconvenience being felt from that, it was enacted by 25 E. 3. c. 19., “ That notwithstanding such protections, the parties which have actions against their debtors, shall be answered in the King’s Court by their debtors ; and if judgment be thereupon given for the plaintiff or demandant, the execution of the same judgment shall be put in suspense till gree be made to the King for his debt, and if the creditors will undertake for the King’s debt, they shall be thereunto received, and shall have execution against the debtors of the debt due, adjudged to them, and also shall recover against them as much as they shall pay to the King for them.” No question can arise upon this act of parliament, because it only applies to those cases where protection had been granted to the King’s debtors, which has not been done here ; and, indeed, it appears from Co. Litt. 131. b., that these protections are now entirely fallen out of use.

On the part of the Crown, it is contended that the King, by his prerogative, has a right to be first served and paid by his debtors, provided his process issues at any time before there is a complete divesting of the property out of the debtor : and that, although upon the seizure by the sheriff under

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an execution, there is a special property vested in him, yet that the general property remains in the debtor till there is an absolute alteration, which can only be by sale. This extent of prerogative is denied by the judgment creditor, and he says that, upon the seizure by the sheriff, the property is divested out of the debtor; and whether it be so or not, yet that the execution is executed by the seizure, and that the Crown process comes too late.

The first case in the order of time, relied on by the Crown, is that of *Stringfellow v. Brownsoppe*\*, which, as it has been already stated, it is not necessary for me to go through again. The same case is also to be found in Rolls' Abridgment, 158., tit. Prerogative of the King. Some doubt seems to have been expressed at the time, as to the propriety of the decision; but, assuming it to be right, I do not think it trenches on the ground on which I form my opinion, because that was an *extendi facias* on a statute staple, under which the goods are by the writ directed to be seized into the hands of the Crown, and after that is done, and so returned by the sheriff, another writ called a liberate issues, commanding the sheriff to deliver them to the creditor to hold, until he shall be satisfied his demand. The property, therefore, does not pass out of the debtor till the liberate, and the execution cannot be considered as executed till the liberate is executed. And in *Blayne's Case*†, where a question arose whether a lessee was liable for rent incurred before the time of a writ of *extendi facias* and a liberate,

\* Dyer, 67 b.

† Cro. Eliz. 47.

it was held, that before the liberate awarded *nihil operatur*, and the writ of *extendi facias* is but of form, when it speaks of seizing into the Queen's hands, for it never was seen that lands were seized upon that writ. *The King v. Andrew* \* is relied upon on the part of the Crown, for what Chief Baron Steel says, as the reason of his judgment against the Crown, that the title of the subject was prior to that of the King, and was executed. Whatever effect that opinion of Chief Baron Steel may have upon the statute 33 H. 8., it can have none to support the doctrine of prerogative, contended for on the part of the Crown; because, as the title of the subject was complete on the delivery of the land on the elegit, the question of prerogative could not arise. The case of *Smallcombe v. Cross and Buckingham*, reported in 1 Lord Raymond, 275., 1 Salk. 320., and 5 Modern, 376., and in other books, has also been mentioned. That case arose on two writs of *fieri facias*, at the suit of different creditors, delivered to the sheriff on the same day, and he executed the last the first, and therefore proves nothing as to the point of prerogative. And as to any question arising, whether the execution was executed, it is to be observed, that there was no seizure under the first writ. In the report in 5 Modern, Shower says, in argument as to the prerogative, "That if the King's writ of extent came out after execution, yet the execution is superseded, and the King's extent shall take up the goods; but if the sheriff had sold the goods by bill of sale, &c., the property is altered, and shall not be divested

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\* Hardr. Rep. 23.

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“by the King’s writ.” This does not reach the point under consideration, for he does not state at what stage of the execution the King’s extent is supposed to come in. And if it did bear upon the point, it is only the statement of counsel. In *Sir Edward Cook’s Case*, 2 Rolls’ Rep. 294., Doddridge says, in p. 296., “If a writ comes for “the King before the *execution is finished*, the “King shall be preferred, as is to be seen in the “case of Brownsoppe, 4 & 5 Mary.” But the question is, when the execution is in point of law finished; and, as he takes his authority from Brownsoppe’s case, his opinion carries it no further than that case. Hobart C. J., in p. 299. of the report of the same case, says, it is certain that where a man is debtor to the King, the King shall never lose his debt, but where there is nothing to satisfy him. This expression of Hobart C. J. does not, however, advance the point contended for by the Crown, for nobody could have any doubt about that. *The Attorney-General v. Capel*\* was a question between the Crown and the assignees of a bankrupt, and in the conclusion of the case it is said: — “Extents “have been held good, that have been made upon “goods actually levied by virtue of a *fieri facias*, “and in the sheriff’s custody, the extent coming “before bill of sale made, so as the property was “not altered.” As far as that statement goes, it is in point for the Crown, but it does not appear how that statement came to be introduced. Sir Bartholomew Shower argued the case as counsel for the assignees, and after his argument, he says, that it was answered, &c.; by which I understand,

\* 2 Show. 480.

that it was answered by the counsel for the Crown. Then a case in the Exchequer is cited, and then at the end of the case the statement above mentioned is added, and which, therefore, I presume, was added by the counsel for the Crown by way of illustration; and if so, it is only the statement of counsel. *The King v. Cotton (a)*, is also relied upon as in favour of the Crown; but that was the case of a distress for rent, which had been seized and appraised before the extent came in; but there is a great difference between a distress and an execution. Chief Baron Parker, in p. 121., says, that the distrainer neither gains a general nor a special property, nor even possession in the cattle or the things distrained. He cannot maintain trover or trespass, for they are in the custody of the law by the act of the distrainer, and not by the act of the party distrained upon. In p. 125., he says, though a sheriff may maintain trover or trespass for goods taken in execution by him against a wrong-doer, because he is answerable over for the value; yet, goods so taken in execution and remaining unsold, are liable to seizure upon an extent. This opinion of Chief Baron Parker is in point for the Crown, and though it was not upon the question in the case, yet it is illustrative of it, and is certainly entitled to great attention.

*The King v. Peck*, Bunbury 8., is in point for the Crown, if it can be relied upon. That was a question whether the sheriff should amend his return, and, upon an order being made, it appears to have been what the sheriff wanted. At the end of the case there is a N. B.: — “It was taken for granted, that though the goods were levied

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(a) Parker, 112.

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“ by virtue of the *fieri facias*, three days before  
 “ the teste of the writ of extent, yet that was  
 “ no bar to the Crown. But quære, if they had  
 “ been sold, for then execution had been exe-  
 “ cuted.” If the last reason be the only one that  
 “ can be adduced, I think it cannot be supported,  
 “ as I think the execution is executed by the seizure  
 “ under the *fieri facias*. What is said in Chief Baron  
 “ Gilbert’s History of the Exchequer, p. 89., may also  
 “ be cited for the Crown. He says, “ But goods were  
 “ bound at common law from the teste of the writ,  
 “ whether it was a *levari* or a *fieri facias*, because  
 “ otherwise the debtors, by alienation of the  
 “ chattels, might disappoint the execution, and  
 “ the Lords having by their process a right to dis-  
 “ train goods, there arose a lien on those goods  
 “ from the time the *levari* was taken out. And  
 “ the King’s prerogative could not be less than  
 “ the right of the subject, and therefore bound  
 “ the goods from the teste of the writ. But this  
 “ was found inconvenient; and, therefore, by  
 “ 29 Car. 2. c. 3., no execution shall bind the pro-  
 “ perty of goods but from the time of the delivery  
 “ of the writ to the sheriffs. But this act seems not  
 “ to extend to the King, for an extent of a later  
 “ teste supersedes an execution of the goods by a  
 “ former writ, because, by the King’s prerogative  
 “ at common law, if there had been an execution  
 “ at the subject’s suit, and afterwards an extent,  
 “ the execution was superseded till the extent was  
 “ executed, because the public ought to be pre-  
 “ ferred to the private property. And the rather  
 “ because the King is supposed, by public busi-  
 “ ness, not to be able to take care of every private  
 “ affair relating to his revenue; and, therefore, no

“time occurs to the King; and if he was to be prevented from his execution by another person coming in before him, laches must be imputed to him, which the law does not allow: and since the King’s debt is preferred in the execution, therefore an executor is obliged by the law to pay the King’s debt on record, before a debt on record to a subject.” Where the Chief Baron is, as above, speaking of the King’s prerogative as to priority of execution, it does not appear to what particular circumstances of the subject’s execution he alludes. He afterwards goes on to point out instances where the King’s extent shall be preferred, where the subject’s execution is running at the same time; but they appear to apply to cases of the subject’s execution on a statute staple, as to which no doubt can be entertained but that it is not complete till the liberate.

The expression of Lord Mansfield, that no inception of an execution shall bar the Crown, is also relied upon for the Crown; but the question is, what is an inception of an execution; and whether this execution has not gone beyond an inception, and whether the execution is not executed.

These appear to be the principal authorities for the Crown, as to the general extent of the prerogative, independent of the statute of H. 8. There can be no doubt but the property is partially divested out of the debtor, and up to the extent of enabling the sheriff to carry the writ into effect, he has a special property in the goods, and so far the property is changed; and the sheriff may maintain either trespass or trover against persons who take the goods from him without lawful

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excuse, as appears by the cases of *Tyrell v. Back*, Cro. Eliz. 639., *Wilbraham v. Snow*, 2 Saunders, 47. 1 Levinz, 282., and in several other books, and is taken for granted in *Clark v. Withers*, to which I shall presently refer, and in the *The King v. Cotton*, already cited. The property is not vested in the creditor, though the contrary is said in some cases, because the sheriff is not to deliver the goods to the plaintiff: he is to make of the goods the sum recovered by the judgment; and which sum is to be paid to the plaintiff, and who, by the mere seizure, has nothing to do with the goods: and in that respect a *feri facias* differs from an *elegit*, where the sheriff is to deliver goods as well as lands to the plaintiff, at a reasonable price. But I think that the property is not wholly divested out of the defendant by the act of seizure, because, if a second execution come in before sale under the first, the sheriff may seize under that, which he could not do if the property was wholly out of the debtor; and so, if upon a writ of *feri facias*, the sheriff has sold as much as will satisfy the first writ, and he continues to go on to sell other goods, the debtor may have an action of trover against the sheriff for such sale, as appears by the case of *Stead v. Gascoyne*, 6 Taunton, 527. And so also the debtor may, I apprehend, maintain trover against the sheriff, in case of his selling when the debtor has tendered him the amount of the money to be levied under the writ, *The King v. Bird*, 2 Shower, 87. The crown contends that, as it is only a special property which is divested out of the debtor, and the general property remains in him, the execution of the Crown is to attach upon the whole property as much as if there had been no special property

divested. But I do not assent to that, and I think that the execution of the Crown cannot have any greater effect upon the property which remains in the debtor, than the execution of a private individual upon it.

It will be proper to see what is the effect of the seizure; whether it constitutes a change of property or not, in case of other conflicting creditors, whether under executions or commissions of bankrupt or otherwise. I think that, generally speaking, as between subject and subject, the execution is executed by the mere act of seizure, and as the execution was begun to be executed, the sale cannot be stopped by any subsequent proceedings.

It is so in case of a writ of error, which operates as a *supersedeas* from the time of the allowance of the writ of error. If it be allowed before the goods are seized, it operates as a *supersedeas*. This point was completely settled in the case of *Meriton v. Stevens*, Willes, 271. And Chief Justice Willes enumerates several cases on the subject, which I shall here state from his judgment.

In Cro. Eliz. 597., the case of *Charter v. Puter*, H. 40 Eliz. B. R., in the King's Bench, was thus: — A *feri facias* was awarded, by virtue whereof the sheriff took the defendant's goods, and before sale, the record was removed into the Exchequer Chamber by writ of error, and a *supersedeas* awarded. The sheriff returned a seizure of the goods, and that they remained in his hands *pro defectu emptorum*. A restitution was prayed, but denied, and it was holden, *per totam Curiam*, that, as the sheriff had begun the execution regularly, he must complete it as far as he had gone, and a *venditioni exponas* was awarded to perfect it. It is there said it was

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so held in the case of *Sir Miles Corbet v. Rookwood*, T. 39 Eliz. B. R., though the record was removed by a writ of error; and in Dy. 98. a. 99. b. p. 1. M., there is a case exactly to the same purpose. In Moor, 542., H. 40 Eliz. B. R., it is held that if the sheriff take goods in execution on a *fi. fa.*, and has them in his hands not sold, and then a *supersedeas* comes to the sheriff, yet he shall not deliver the goods, but shall proceed to the sale of them, because the beginning of the execution was before the *supersedeas* delivered, and, the execution being entire, shall not be divided. In Yelv. 6., *Tocock v. Honyman*, Tr. 44 Eliz. B. R., upon a writ of error and *supersedeas* to the sheriff after a *fi. fa.*, it was held that he shall proceed to the sale of the goods which he has before the *supersedeas*, but shall levy no more: *per totam Curiam*. In 1 Ventris, 255., in the case of *Baker v. Bulstrode*, it was held, that if before the writ of error the sheriff returns *fieri feci et non inveni emptores*, the execution is not to be undone; and in 1 Salk. 322, 323., in the case of *Clark v. Withers*, it is said that the execution is one entire thing, and is not to be superseded after it is begun. The only case to the contrary is 2 Roll. Abr. 491., where it was said, that if the *supersedeas* comes before the sale, the goods shall not be sold, because (as it is said there) the property is not altered by the seizure; which reason not being a true one, Chief Justice Willes says, "I give no credit to this case." Chief Justice Willes refers to the form of a writ of *supersedeas*, which is in the *Officina Brevium*, §78., which is, That if the judgment be not executed before the receipt of the *supersedeas*, the sheriff is to stay from executing any process of execution until the writ of error is determined.

From the determinations above cited, it appears that the execution is considered as executed, by the seizure under the *fi. facias*; and though the writ of *supersedeas* forbids the sheriffs from executing any process of execution, he may nevertheless proceed to sell the goods already seized.

I shall now state other cases, in which it appears to be considered that the execution is complete by the seizure under the *fi. facias*. *Lechmere v. Thorowgood and Another, Sheriffs of London*, 3 Mod. 236., was an action of trespass by the assignees of a bankrupt, for taking their goods. On a special verdict it was stated, that one Toplady on the 28th of April became bankrupt, against whom a judgment was formerly obtained. The judgment creditor sued out a *fi. fa.*, and the sheriff, on the 29th of April, seized the goods of Toplady; that after the seizure, and before any *venditioni exponas*, that is, on the 4th of May, an extent issued against two persons who were indebted to the King, and by inquisition Toplady was found indebted to them; whereupon a parcel of the goods were seized by the sheriffs upon the extent, and sold; but, before the sale, or any execution of the Exchequer process, a commission of bankrupt issued against Toplady, and the commissioners, on the 2d of June, assigned the goods to the plaintiff. The question was, whether the extent did not come too late? and it was held it did; or whether the *fi. fa.* was well executed, so that the assignees of the bankrupt's estate could not have a title to those goods which were taken before in execution, and so *in custodia legis*? and it was held they had no title. The same case is reported in 1 Show. 12., and it is said in a note in Shower, that it was decided

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entirely with reference to the liability of the officer. The same case is reported in Comberbach, 123.; and Lord Holt there says, that the property of the goods is vested by the delivery of the *feri facias*, and the extent afterwards for the king comes too late; and that on the statute of frauds and perjuries. The reason given is not a correct one. It is most likely a mistake of the reporter; and, taking into consideration the whole of the various reports of this case of *Lechmere v. Thorowgood*, I do not consider it as having decided this precise point, but only as shewing a general opinion of the judges of that day, that the extent of the Crown should not be preferred to that of the subject in a case like the present. *Clark v. Withers*, though it does not relate to an extent, yet it shews in what light the seizure under a *feri facias* is considered, and that the execution is thereby in effect considered to be executed. It is reported in 6 Mod. 290. 2 Lord Raymond, 1072. 1 Salk. 322. It was a writ of error on a judgment in the Common Pleas upon a *scire facias*, by Clark, against the defendant, sheriff of Middlesex. The case appeared to be, that one Dives, as administrator of J. S., had recovered a judgment for 304*l.* against Clark, and sued out a *feri facias*, directed to the defendant, sheriff of Middlesex; and upon that writ the defendant returned, that he had seized goods to the value of the debt; and that they remained in his hands for want of buyers. Afterwards, and before the goods were sold, Dives died, and Clark sued out this *scire facias* to the defendant, to shew cause why the goods should not be restored to him, as supposing, that now that Dives is dead, there is nobody can have the fruits of the

execution; and upon demurrer to this writ, judgment was given for the defendant in the Common Pleas. The point determined is, that the death of a party who has sued out a *fiery facias* after the seizure of goods, but before the sale of them, will not abate the execution, or entitle the party against whom the execution was sued out to a restitution. In Lord Raymond's Report, Lord Holt says, "After seizure of the goods; there is nothing to be done by the sheriff but to bring the money into court." Gould J. says, "The substantial part of the execution is executed in the lifetime of the executor, and there is nothing wanted to complete it but the formal part. For as soon as the sheriff seizes the goods by virtue of the writ of *fiery facias*, he gains a special property in them, and may maintain trespass against the defendant if he take them away; so in Cro. Eliz. 635." So he may maintain trover against a stranger who takes them away. In *Wilbraham v. Snow*, 2 Saunders, 47. 1 Lev. 282. Powell J. says, "An execution is an entire thing, and the sheriff that takes the goods in execution shall go on and sell, though he is out of his office, and not the now sheriff." And in the report in 6 Mod., Powys J. says, that the selling is but a formal part of the execution. And in the judgment of the Court, in *Salkeld*, it is said, "An execution is an entire thing, and cannot be superseded after it has begun."

I shall now state in what cases the execution has been considered as executed, arising upon questions of the construction, and operation of the bankrupt laws. By 21 Jac. 1, c. 19. s. 9., it is enacted, that all and every creditor and creditors

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having security for their several debts by judgment, statute, recognizance, specialty, or other security, or having no security, or having made attachments of the goods and chattels of the bankrupt whereof there is no execution or extent served and executed upon any of the lands, tenements, hereditaments, goods, chattels, and other estate of the bankrupt before such time as he shall become bankrupt, shall not be relieved upon any such judgment, statute, &c. for any more than a rateable part of their just and due debts with the other creditors of the bankrupt, without respect to any such penalty or greater sum contained in any such judgment, statute, &c. or other security. Upon this statute it has been determined, that when a creditor has obtained a judgment, and sued out a *fiery facias*, and a seizure has been made under it; if before sale an act of bankruptcy intervenes, the judgment creditor shall not be obliged to come in under the commission, but the sheriff may proceed to sell the goods. The words of the act being, "whereof there is no execution or extent served or executed," it might be contended that the execution under which the sheriff has seized, but not sold, is not an execution executed, because there has been no sale, but the determinations upon the statute of James shew, that as soon as goods have been seized under the *fiery facias*, that is considered in law as being an execution executed; and the sale is but a formal part of the execution of the process, and has, therefore, no further effect on the goods in respect of the alteration of the property in them. It cannot be necessary to quote any authority for this position, because the constant practice at *nisi prius*,

in disputes between the assignees of a bankrupt and a judgment creditor, is, to enquire whether the act of bankruptcy or the seizure of goods under a *fieri facias* was first, and to consider the execution as executed by the seizure under the *fieri facias*. I think, therefore, it appears quite clear, that in all cases between subject and subject, the execution is considered as executed by the mere seizure of the goods under a *fieri facias*.

Then the material question is, whether, under the process of the Crown, the same rule is to hold as between subject and subject. There is no doubt but the interest of the Crown is to be preferred, all things being alike in the two cases. The Crown has a preference by having the goods bound from the teste of the extent, which is an advantage which the subject has not; and if the extent be tested before the seizure under the *fieri facias*, the extent will prevail. But there seems no reason, upon principle, why, if a rule be perfectly well established as between subject and subject, that the execution is executed by the seizure under *fieri facias*, the same principle should not be applied in all cases, even where the Crown is concerned. There is, no doubt, a sort of property remaining in the debtor, upon which a second execution may attach, and on which, therefore, the extent may attach also. It certainly may attach upon it, but it does not therefore follow that it is not only to attach, but also to do away with the execution in the sheriff's hands. And it should seem, that the extent ought only to affect that portion of the property which remains in the debtor, any more than the second execution of a private creditor does. In the case of a pledge of goods by the

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owner, the Crown's extent can only take the goods subject to the pledge, as is admitted by Chief Baron Parker, in *The King v. Cotton*, p. 118.; and so also in *The King v. Lee*, 6 Price, 379. It was held, that if a factor has a lien upon goods in respect of acceptances, the Crown could only take the goods subject to the claim of the factor: and so also, in the case of *Casberd and Another v. Ward and Others*, 6 Price, 410. a deposit of title deeds by a simple contract debtor of the Crown is an equitable mortgage, and binds the Crown. So also a wharfinger has a lien against the Crown for his general balance; and if by the charge upon the property by the contract of the party, the Crown only takes it subject to the charge, the same reason ought to apply where a creditor has obtained a claim upon the property by the process of the law.

I shall now consider what effect the 33 H. 8. c. 39. has upon the case. By the 50th section of the act, bonds to the King are put upon the same footing as statutes staple, and in the 52d and following sections, up to and including the 57th, provisions are made for the course of proceeding for the King's debts. A further provision is made in the 73d section, and then comes the 74th, upon which the question arises: — “ That if any suit be  
“ commenced or taken, or any process be hereafter  
“ awarded for the King, for the recovery of any  
“ of the King's debts, that then the same suit and  
“ process shall be preferred before the suit of any  
“ person or persons: and that our said sovereign  
“ lord, his heirs and successors, shall have first  
“ execution against any defendant or defendants  
“ of and for his said debt, before any other person

“or persons, so always that the King’s said suit  
 “be taken or commenced, or process awarded for  
 “the said debt, at the suit of our said sovereign  
 “lord the King, his heirs or successors, before  
 “judgment given for the said other person or  
 “persons.” And in my opinion, as there was no  
 award of process for the King’s debts in this case  
 till after judgment was obtained for the private  
 creditors, and till after the goods were seized under  
 the *feri facias*, the execution at the suit of those  
 creditors must prevail over the extent.

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In construing acts of Parliament, it is a safe rule  
 to follow the very words of the act, unless so strict  
 an interpretation be not reconcileable with other  
 clauses, or be contrary to the general intent of the  
 act, or be inconsistent with some established prin-  
 ciple of law, which it may be supposed it was not  
 intended to interfere with. But several objections  
 are made to this right of the creditors falling  
 within this act of parliament. It is said, first,  
 that this proceeding by extent is not a taking or  
 commencing a suit, or awarding process. It is  
 certainly not taking or commencing a suit, but, I  
 think, it is awarding process.

An extent is a writ, and so constantly called.  
 It commands the sheriff to take the body of the  
 debtor, and so far that part of the execution is com-  
 plete. It is true, that as to goods it is not complete  
 till a *venditioni exponas* issues, as it is part of the  
 command of the writ that the goods are not to be  
 sold till a writ of *venditioni exponas* issues. And so  
 in the case of a subject, the execution on a statute  
 staple is not complete till a liberate issues; but  
 then, when the writ of liberate is sued out, it has  
 relation to the writ of extent, and they become



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but one extent; as is said by the Court in *Audley v. Halsey*, Cro. Car. 148. But I cannot doubt that a writ of extent is process, not only as to immediate extents in chief, but also as to extents in aid. As soon as a debt from a third person to the King's debtor is found by inquisition, and recorded, it falls within the 55th and 56th sections of 33 H. 8., and an *extendi facias*, as there mentioned, may be awarded.

The common course of proceeding upon a record debt to the Crown, whether it be originally of record, or whether it be not originally of record, but recorded by inquisition under a commission, is by *scire facias*, where the debt is not in danger of being lost; and in that case the *extendi facias* is the ultimate process of execution. But if the debt be in danger of being lost, then an extent may issue in the first instance. But no extent in the first instance, either against the immediate debtor to the Crown, or against persons indebted to the Crown debtor, ever issues, unless there be an affidavit that the debt is in danger.

In *The King v. Pearson*, 6 Price, Chief Baron Thomson says, in p. 292., "In the case of an extent, an affidavit of the insolvency of the debtor is made; but if that cannot be done, the *scire facias* is the only course: the Crown has not an election except in cases of insolvency." And the rule in the Exchequer of 15 Charles requires, that he who desires any debt to be proved by inquisition in his aid, shall make oath, among other things, that the debtor is much decayed in his trade; so, that unless a speedy course be taken against him, the debt is in great danger to be lost. But it can make no difference as to the nature of the extent,

whether it issue upon a judgment obtained upon a *scire facias*, or whether it issue in the first instance.

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The proceeding by extent in the first instance, seems to be what is alluded to in the 55th section of the statute of H. 8., of proceeding by the various modes there mentioned, and, amongst others, by *extendi facias*, if need shall require. And in this very record the extent is said to be according to the form of the statute made for the recovery of the debts of our lord the King, as is the common form. But I do not think it material, whether the extent in aid be in strictness an execution or not; for at all events, it is a process for the recovery of the King's debt, which is all that the statute mentions; for it is something sued out, by the following up of which, in the usual course of the Court, the King's debt will eventually be paid.

But as a second objection, it is said the 74th section applies only to land, and not to goods. I see nothing in the clause to restrict it. The 56th section speaks of execution upon the body, lands, and goods of the party; and there seems no reason to suppose that the 74th section should be less extensive in its operation.

A third objection is, that the statute enlarges, instead of abridging, the prerogative of the Crown. Assuming, then, that the 74th section applies to the case of extents in aid, and also to goods, it is to be considered whether it increases or abridges the prerogative of the Crown, and in what degree. Upon this statute, it was held in *Sir Thomas Cecil's Case*, 7 Coke's Rep. 19. b., "That the act has given a benefit and advantage to the King: first, In making every bond made to the King in

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menced or process be awarded at the suit of the King, before judgment obtained by the creditor; and that, unless it does so, the Crown shall have no such priority. By the first execution, I understand the prerogative privilege of execution, whatever that privilege may be, and of which the Crown may avail itself, if there be process from the Crown before judgment by the creditor. But if the process be not awarded before such judgment be obtained, then the Crown is to lose the priority of first execution, and the Crown then stands in no other light than a common creditor. The cases of *Butler v. Butler* and *The Attorney-General v. Alderney*, 1 East, 338., may be mentioned, as in favour of the Crown on the construction of the statute of H. 8. But there, the only question was, whether a penalty constituted a debt, which the Court held it did. But in both these cases, the proceedings on the part of the Crown were commenced before the judgments were given for the subjects, and therefore they could not avail themselves of the provisions of the statute.

Upon the best consideration I have been able to give to this case, I think that this writ of extent should not be executed by the sheriff, by extending and seizing the goods into the King's hands, and selling them to satisfy the King's debt. And I think it makes no difference whether the extent be in chief or in aid.

*Bayley B.* — The question proposed for the consideration of the Judges is in substance this:— Whether, if the sheriff has seized the goods of a debtor under a *feri facias*, and those goods remain unsold in the sheriff's hands, they are liable to an extent of the Crown tested after such seizure, and

may be seized and sold to satisfy the Crown's debt, without regard to the writ of *feri facias*? And I am of opinion that they are so liable.

The writ of extent directs the sheriff to enquire what goods and chattels the King's debtor, against whom it issued, had in his bailiwick at the time it issued, and to take and seize the same into his hands, there to remain till the King's debt should be satisfied. The question then is, whether by the seizure under a *feri facias*, the goods and chattels so seized, cease, as against the Crown, to any and what extent, to be the goods and chattels of the debtor, or whether the Crown is not entitled to treat them as the goods and chattels of the debtor to all intents and purposes, and to the same extent, as if there had been no seizure under the *feri facias*?

The command to the sheriff, by a writ of *feri facias*, is, that of the goods and chattels of the defendant he cause to be made the sum for which judgment was given. Till money is made, the execution is in progress only. The seizure of goods is only *in ordine ad*, that the money may be made. The goods are still the debtor's goods. If he satisfies the execution, it is matter of right that they shall be returned to him: he has no occasion for a bill of sale from the sheriff; he is entitled to them upon the footing of his original ownership. If the act of God destroys them, the loss is his, not the sheriff's. That the Crown is entitled to consider land and goods as continuing the land and goods of the King's debtor, notwithstanding a seizure thereof into the King's hands upon an *extendi facias* out of Chancery upon a statute staple, is clear from Stringfellow's case, which has been cited; and

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the foundation of that right may be collected from the recital in the writ, *that it is the prerogative of the Crown to be first paid and served by its debtors*; and if the prerogative is to prevail against a seizure into the King's hand upon an *extendi facias*, why is it not to prevail against a seizure into the hands of the sheriff, who is the King's minister, upon a *feri facias*? Can any satisfactory reason be given for a distinction? The foundation of the King's right in the one case is, that the property remains in the original owner till liberate; and in the other, I apprehend it remains as against the Crown in the original owner, till the things are sold: 41 Ed. 3. Exors. 38.

That the Crown is entitled to consider property as continuing to belong to the King's debtor, notwithstanding a commission of bankruptcy, which has been called a statutable execution, until a conveyance is made thereof under the commission, is established by *Rex v. Hanbury*, in 1668, and *Rex v. Capel*, in 1686, 2 Show. 480., and *Brassey v. Dawson*, Str. 987., in 1733; and that it is equally entitled, notwithstanding a seizure upon a distress for rent, is taken for granted in *Rex v. Dale*, Bunb. 42. in 1719, and was solemnly adjudged in *Rex v. Cotton*, in 1751, Park. 112. But I forbear stating these cases at length to the House, notwithstanding the strong analogy they bear to the case supposed in your Lordships' question, because they have been already stated, and because the authors directly upon the point are so numerous and strong. The first authority I am aware of upon the point is, the *dictum* of Dodderidge J., in *Sir Edward Cook's Case*, 2 Roll. 295. He lays down this position:—"If a writ

“ comes from the King before the execution of  
 “ the *subject finished*, the King shall be pre-  
 “ ferred, as may be seen in *Brownsoppe's Case*,  
 “ i. e. *Stringfellow's Case*; and though there be  
 “ sufficient for you and for the King, you must wait  
 “ till the King is satisfied; and if there be not  
 “ enough for both, you must suffer not only delay  
 “ but loss; for when the public and private interests  
 “ are put in the balance of justice, the public shall  
 “ weigh down the private, because the public is  
 “ better than the private. In *The Attorney-General*  
*v. Capel* (1686), in the Exchequer (2 Show. 480.),  
 Sherwin says, “ Extents have been held good that  
 “ have been made upon goods actually levied by  
 “ virtue of a *fieri facias*, and in the sheriff's cus-  
 “ tody, the extent coming before a *bill of sale*  
 “ made, so as the property was not altered.” *Nota*.  
 In *Smallcombe v. Buckingham*, 5 Mod. 376, 377.  
 Tr. 9 W. 3., 1697, where the question was, which  
 of two subjects' writs of *fieri facias* should have  
 the priority? it had been said, *arguendo*, that if  
 the King's writ came after a *sale* by the sheriff  
 under a *fieri facias*, the goods might be seized  
 again for the King. Shower sets the matter  
 right: — “ If the King's writ of extent comes out  
 “ after execution, yet it (*i. e.* the execution) is  
 “ superseded, and the King's writ shall take up  
 “ the goods; but if the sheriff *had sold the*  
 “ *goods by bill of sale*, the property is altered,  
 “ and shall not be divested by the King's writ.”  
 In *Rex v. Peck*, Bunb. 8., 4th of July, 1716, the  
 sheriff seized upon a *fieri facias* from C. B. in  
 April, but before he *sold*, an extent was delivered  
 to the sheriff, tested the 2d of May. A motion  
 was made by him to amend his return to the ex-

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tent. Bunbury makes this note:—"N. B. It was " taken for granted, that though the goods were " levied by *fieri facias* three days before the teste " of the extent, yet that was no bar to the Crown;" " but *quære*, had they been sold, for then *execution* " *had been executed*." At no great distance of time, viz. 9th of June, 1722, Gilbert was made a Baron, and on the 1st of June, 1725, Chief Baron; and his Treatise upon the Court of Exchequer will shew what was his opinion upon this point. He had just been stating that the King's prerogative could not be less than the right of the subject, and that the *levari* or *fieri facias* of the subject bound his debtor's goods from the *teste* of the writ. This, he says, was found inconvenient, and occasioned the provision in 29 Car. 2., that no execution should bind the property in goods but from the delivery of the writ to the sheriff. "But this act," he continues, "seems not to extend to the King, " for an extent of a later teste *supersedes an execu-* " *tion of the goods* by a former writ; because, by " the King's prerogative at common law, if there " had been an execution at the subject's suit, and " afterwards an extent, the execution was super- " seded till the extent was executed, because the " public ought to be preferred to the private pro- " perty; and the rather, because the King is sup- " posed, by public business, not to be able to take " care of every private affair relating to his re- " venue, and therefore no time occurs to (*i. e.* hin- " ders or obstructs) the King; and if he was to " be prevented from his execution by another per- " son coming in before him, *laches* must be im- " puted to him, which the law does not allow." Here, therefore, you have the deliberate opinion

of a man of great industry and research upon a point it was peculiarly his duty to investigate, relative to what was the course of proceeding in his own Court, and likely to be of frequent occurrence, and he speaks of it without the least degree of doubt, and gives what has the appearance of a satisfactory reason for the prerogative priority. In a few lines afterwards he puts the case, where the subject has a statute staple, or a judgment, prior to the debt of the King, and seizes the debtor's lands before any seizure by the King, and considers the question, what shall be the effect of a subsequent extent by the Crown? and he lays down this distinction:—That if the subject has the possession delivered to him by a liberate, before the extent from the Crown, the subject shall hold the land discharged from the King's debt, but if the King's extent come before the possession by liberate, the King's debt shall be preferred, and the subject wait till the King's debt is satisfied.

In the able and elaborate judgment of Parker Ld. C. as reported in *Rex v. Cotton*, (in which he treats *Stringfellow's Case* as good law, and considers as the line of distinction in these cases, whether the property remains in or is divested out of the King's debtor,) he says, upon the point now under consideration, "*Goods taken in execution and remaining unsold*, are liable to seizure upon "*an extent*."

I now come (chronologically) to the case of *Uppom v. Summer*, in C. B. in 1779, and of *Rorke v. Dayrell*, eighteen years afterwards, in 1797, in K. B. They are both in point, and if they be law, the judgment in this case ought to be against the Crown. I am of opinion they are not law.

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When *Uppom v. Sumner* first came before the Court, the counsel for the execution creditor (Serjeant Walker) declared he could not support the case, and gave it up: he afterwards desired to argue it, and put it (upon what it had never before been put) upon the statute of H. 8., and said (with what truth the authors I have just been mentioning will shew), it had always been understood that an extent was to be postponed to a judgment. Serjeant Grose, on the other side, does not appear to have brought under the notice of the Court any of the direct authorities I have mentioned, but contented himself with relying on *Rex v. Cotton*, and the *dictum* it contained, and upon *Rex v. Baden, Show, P. C. 72.*, in which I can find nothing bearing upon the present point. The Court took time to consider, and then decided for the execution creditor, upon the construction they put upon 33 H. 8. c. 39. s. 74., and upon the authorities of *Lechmere v. Thoroughgood*, Comb. 123. 3 Mod. 236. 1 Vent. 169. 2 Vent. 159. 1 Show. 146.; *The Attorney-General v. Andrews*, Hard. 23. 2 Com. Dig. 538.; and *Rex v. Dickenson*, Park. 262.; all of which I shall consider by-and-by. In *Rorke v. Dayrell*, the counsel for the execution creditor again put the case upon the stat. 33 H. 8. c. 39. s. 74., and relied upon *The Attorney-General v. Andrews*, *Lechmere v. Thoroughgood*, *Uppom v. Sumner*, and the passage in Com. Dig. The counsel for the Crown brought forward many authorities not noticed in *Uppom v. Sumner*, viz. Gilb. Exch. 90., Doddridge's *dictum* in *Sir Edward Cooke's Case*; the *dictum* in *Petit v. Benson*, Comb. 452.; the *dictum* in 2 Show. 481., and the decision in *Rex v. Peck*. It cannot be said, there-

fore, but that the bulk of the authorities were brought before the Court, in *Uppom v. Sumner*, and the case was twice argued. Lord K. lays it down, "that wherever the *property in goods remains in the King's debtor at the time*, and one "execution at the suit of the King and another "at the suit of the subject, are sued out, the "former will prevail." But he proceeded on the ground (now generally admitted to be erroneous) that, by the delivery of the writ to the sheriff, the property in the goods was bound and altered, so that there remained no property in the debtor upon which the King's prerogative could attach. The other three Judges founded their judgment upon 33 H. 8. and upon *Uppom v. Sumner*, but did not notice or discuss any of the authorities cited for the Crown.

After these two decisions, the point came again under consideration in *Rex v. Pitman* (or *Rex v. Wells and Allnutt*), in the Exchequer in 1805; and, after full consideration of all the authorities, the Court adopted the principle laid down in the earlier cases, and overruled the cases of *Uppom v. Sumner* and *Rorke v. Dayrell*. This is mentioned in 2 Wm. Saund. 70. E., and the minutes of Lord C. B. M'Donald's judgment are to be found in 16 East, 278. This decision was adhered to in *Rex v. Sloper and Allen*, in the Exchequer, in 1818, 6 Price, 114., *dubitante* Wood B.

This being the state of the authorities upon the direct point, I shall not trespass further upon the patience of the House, except to shew, that the cases relied upon in *Uppom v. Sumner* (with the exception of the passage in Comyn), will not support the judgment, and to state it as my opinion,

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that the statute of 33 H. 8. applies only to cases in which the subject's execution is *complete* before the Crown's extent is issued, not to cases where it was in *progress* only.

In *The Attorney-General v. Andrews*, Hard. 23., it is obvious, upon an attentive consideration of the report, that the execution *was complete* before the *teste* of the King's extent; that the land was not in the King's hands, as in *Stringfellow's Case*, but in *Andrews'*, the execution creditor. The form of proceeding implies it: it is stated as a fact that Andrews had taken the land. Steel C. B. says distinctly, the subject's title was prior to the King's, and *executed*; and he and the other Judges could not have relied upon Stringfellow's case, as they did, as an authority against the Crown, unless the land had been delivered over to the execution creditor, and the execution had been *completed*. But for that fact Stringfellow's case would have been an authority the other way. *The Attorney-General v. Andrews* therefore does not bear upon the question now under consideration, viz. the right of the Crown against an *incomplete* execution, —an execution which is in progress only, and not perfected.

*Lechmere v. Thoroughgood*, Comb. 123., 3 Mod. 236., was trespass by the assignees of a bankrupt against the sheriffs of London, for seizing the goods after an act of bankruptcy, and before the commission: the sheriffs seized under a *fieri facias* on the 29th of April, and on the 4th of May an extent issued. The question, therefore, was not between the execution creditor and the Crown, but between the assignees and both; for if either the *fieri facias* or the extent were good against

the assignees, it was an answer to the action. Whatever fell from the Court, therefore, was wholly extra-judicial, and its weight may be appreciated, by what Comberbach represents to have fallen from Lord C. J. Holt: — “The “property “of the goods is vested by the delivery of the *fiery facias*, and the extent afterwards for the King “comes too late, and that on the statute of frauds.” Now that the statute of frauds does not, in this respect, bind the Crown, is clear beyond all doubt; and a reliance upon this as one of the grounds of decision in *Uppom v. Sumner*, materially diminishes the authority of that judgment.

*Rex v. Dickenson*, Park. 262., was a case not between conflicting executions, but between the claim against an execution of the Crown, of an assignee of a simple contract debt on the one hand, and the claim of a judgment creditor of the testator upon the other. The testator was indebted by judgment to A., and by a simple contract to B., and died. B. caused the debt to him to be seized into the King's hands; and upon a *scire facias* thereupon, against the executors, one question was, whether the judgment should be preferred to the simple contract the King had seized? And the opinion was that it should, upon the words of the statute 33 H. 8.: — “So always that the “King's suit should be taken and commenced, or “process awarded for the King's debt, before judgment given for the other persons;” but how this bears upon the question between concurrent and conflicting executions I do not see. — Note. This was an old case, in 1642; Lord C. B. Parker's reports begin in 1743.

This brings me to the statute 33 H. 8. c. 39.

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s. 74. The provision in that statute is, "that if  
 " any suit be commenced or taken, or any process  
 " be hereafter awarded for the King, for the re-  
 " covery of any of the King's debts, that then the  
 " same suit and process shall be preferred before  
 " the suit of any person or persons: And that our  
 " said sovereign lord, his heirs and successors, shall  
 " have first execution against any defendant or de-  
 " fendants, of and for his said debts, before any  
 " other person or persons, so always that the said  
 " King's suit be taken and commenced, or process  
 " awarded for the said debt at the suit of the King,  
 " his heirs or successors, before judgment given for  
 " the said other person or persons." To form a  
 judgment, what construction is to be put upon this  
 provision? It is necessary to see how the law  
 stood when this statute passed. At the common  
 law the King could protect his debtor, so that he  
 could not be sued at all. By 25 Edw. 3. c. 19.,  
 a creditor might sue his debtor notwithstanding  
 the King's protection, so far as to obtain  
 judgment; and if he would undertake for the  
 King's debt, he might sue out execution; but  
 without such undertaking the execution of the  
 judgment was to be put in suspense till gree  
 were made to the King of his debt. The pro-  
 vision, then, in 33 H. 8. c. 39. s. 74. seems to me  
 merely to narrow the prerogative; that whereas  
 before, the creditor might be restrained from suing  
 out execution till the King's debt were agreed for,  
 whether the King was suing for his debt or not,  
 that, from thenceforth, the right of restraining the  
 creditor from suing out execution should be con-  
 fined to those cases in which the King was suing,  
 or had process awarded for his debt; but that that

right should nevertheless continue, if the King was suing, or had process awarded. This construction appears to me to satisfy all the words of the clause, and is consistent with all the early authorities upon the point in question; and leaves untouched the common law prerogative of the Crown over an execution, whilst it is in progress.

Upon the whole, therefore, considering that the property in goods is not altered merely by a seizure under a *feri facias*; considering that the 33 H. 8. c. 39. c. 74. does not apply to the case of conflicting executions between the Crown and a subject, where the Crown's extent is issued, whilst the goods are in the hands of the sheriff under a *feri facias* at the suit of a subject; considering that, according to Lord C. J. Treby's note, in Dyer, 67. b., this very point is described as having been acted upon in 24 Eliz. (1582); considering that Dodderidge J. lays it down as clear law, 20 Jac. 1. (1624), and that it is noticed as such in 1688 and 1697, in *The Attorney-General v. Capel*, 2 Show. 480., and *Smallcombe v. Buckingham*, 5 Mod.; considering Bunbury's note upon the point, reported (1716) in *Rex v. Peck*; that Lord C. B. Gilbert refers to it, as settled and indisputable, in his Exchequer treatise; and that Lord C. B. Parker considers it as law, in his elaborate judgment in *Rex v. Cotton*; and that it has since been solemnly decided in *Rex v. Peckman*, or *Rex v. Wells and Alknutt*, and acted upon in *Rex v. Sloper and Allen*; considering that 33 H. 8. is never mentioned as bearing upon the point until *Uppom v. Sumner*, and is shewn to be inapplicable, by *Rex v. Peckman*; considering the analogy furnished by *Stringfellow's Case*, by *Rex v. Dale* and *Rex v.*

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*Cotton*, in cases of distress ; and by the *Attorney-General v. Capel*, and the *Attorney-General v. Hanbury*, and *Brassey v. Dawson*, in cases of bankruptcy ; I am of opinion, that if the sheriff seizes upon a *feri facias* at the suit of a subject, and whilst the goods he seized remain in his hands, if an extent issue at the suit of the Crown, those goods are liable to the Crown's extent. Upon the second question, if it makes any difference whether the writ of extent was in chief or in aid ? I am of opinion it does not. *The Attorney-General v. Capel* was an extent in aid.

*Tindal C. J.* — The questions proposed by your Lordships have been so often adverted to by the learned Judges who have preceded me in delivering their opinions, that it is altogether unnecessary to refer to them : I shall content myself, therefore, with saying, that upon the first question proposed by your Lordships, I agree in opinion with the majority of the Judges, that the extent in aid, tested and delivered to the sheriff after the seizure by the sheriff under the *fi. fa.*, but before the sale under such writ, is by law to be first executed by the sheriff, without regard to the writ of *fi. fa.*

It appears to me, my Lords, that the whole question depends upon the determination of two points, and two points only : — First, Whether the property of the Crown debtor is altered by the seizure of the sheriff under the *fi. fa.* ? and, secondly, supposing such property to remain unaltered, Whether the stat. 33 H. 8. applies to the present case, by restraining that which, before the statute, was the undisputed prerogative of the Crown, namely, the preference of the Crown where the execution of the Crown comes in competition with

that of the subject? for if the property in the goods seized under the *fi. fa.* remains still in the debtor unaltered by such seizure, then the execution of the subject's writ is begun only, not completed at the time of the issuing the Crown process. Both the writs are then in conflict and competition together, and the goods of the subject are then within the exigency of the writ of extent, which calls upon the sheriff "to take and seize into the "King's hands all the goods and chattels which "the defendant then has, (that is, at the time of "the teste and issuing of the extent,) to satisfy the "King's debt," unless indeed the statute of H. 8. has interposed a restriction applicable to the present case.

That the determination of these two points does in fact involve the whole of the present enquiry, appears from this, that the only two direct authorities for the preference of the subject's execution are grounded on these two points alone: the case of *Uppom v. Sumner* resting on the application of the stat. of H. 8., and the case of *Rorke v. Dayrell* being decided by Lord Kenyon on the alteration of the property in the goods, and by the other three Judges on the authority of the above-mentioned statute. And upon the first of these points it appears to me, that the property in the goods seized under the *fi. fa.* is not in any manner altered by the seizure, but that it still continues in the debtor until the actual transfer thereof by the sheriff's sale under the writ to a stranger. If the property is changed by the seizure, it must be transferred either to the judgment creditor or to the sheriff, but there are no words in the writ to give it to either. The sheriff is directed by the writ of

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*fi. fa.* to cause to be made of the goods and chattels of the defendant the debt or damages recovered by the plaintiff; in this respect the language of the *fi. fa.* differing from that of the *elegit*, by which he is directed to deliver to the plaintiff all the chattels of the debtor, and a moiety of the land, until the debt be levied. So far indeed is the property in the goods from being transferred to the plaintiff in the suit, that the sheriff cannot deliver the goods to the plaintiff in satisfaction of the debt: *Thomson v. Clerk*.<sup>\*</sup> Again, if the defendant in the action, after seizure of his goods under the *fi. fa.*, pay the debt to the sheriff, he retains his goods, and is discharged from the execution, and any further remedy of the plaintiff is against the sheriff only: *Cro. Eliz.* 209. But if the property in the goods had been altered; if it had vested either in the plaintiff himself, or the sheriff, or had become an actual pledge or security for the payment of the debt, it is difficult to see upon what principle the defendant should hold his goods again, discharged of the debt, before actual payment thereof has been made to the plaintiff. Again, if the goods after seizure under the writ, but before sale, are destroyed by any unavoidable means without the sheriff's default, the loss does not fall, either upon the plaintiff or upon the sheriff, but upon the debtor, on whose goods a second levy may be made: *Hob. Rep.* 60.; but if the property in the goods had been altered by the seizure, why is not the loss to fall upon that party whose property they have become; as undoubtedly after the sale the loss would be that of the purchaser. Again, if

<sup>\*</sup> *Cro. Eliz.* 504.

the sheriff, having received two writs of *fi. fa.*, sell under that which is last delivered to him, although he make himself liable to the plaintiff who delivered the first writ, the property of the goods is bound by the sale under the second writ, and the party cannot sell them by virtue of his execution first delivered : *Smallcomb v. Cross*.\* And yet, if the property was altered by the delivery of the first writ to the sheriff, upon what principle can the sale under the second convey the property to a stranger? The case of *Hutchinson v. Johnston*† decides the converse of this last proposition, viz., that if the sheriff seizes under the writ last delivered to him, but, before sale, discovers that another writ has been delivered to him at an earlier time, and sells under the writ first delivered, and satisfies the debt of the plaintiff in the earlier writ, he is justified in so doing ; though, if he had sold under the second writ, he could not have done so. These two authorities seem decisive, that it is the sale, not the seizure, which alters the property. It has, however, been argued, that the rule of the common law, by which the property in the goods is bound by the award of the writ of execution, altered as it has since been by the statute of frauds, so as to become bound only by the delivery of the writ to the sheriff, implies, that the property is divested out of the debtor by such delivery of the writ. But the meaning of these words has been explained and defined by various decisions. It will be sufficient to cite the case of *Payne v. Drewe*‡, in which all the former cases are considered ; and in which Lord Ellenborough C. J. lays down the rule to be, that “ the

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\* 1 Ld. Raym. 252.    † 1 T. R. 729.    ‡ 4 East, 523.

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“ goods are bound by the delivery of the writ to the sheriff as against the party himself, and all claiming by assignment from, or representation through or under, him.” In this sense, and to this extent, therefore, may the goods of the defendant be bound by the delivery of the writ to the sheriff, without the consequence contended for, that the property in the goods is in any manner altered thereby. It has further been contended, that, as the sheriff may maintain an action of trespass or trover against any wrongdoer for taking goods which he has seized, it therefore follows that he, and not the defendant, has the property in the goods so seized. But to this argument it appears sufficient to answer, that any person who has the legal possession of goods, though not the property, may maintain this action against a wrongdoer; for a mere wrongdoer cannot dispute the title of the party who is in the possession of the goods, without any colour of legal title. The sheriff, no doubt, has the legal custody and possession of the goods after seizure; he has a special property in him for that purpose; for the law has directed him to seize and make sale thereof. But this affords no argument that the absolute property in the goods is altered and divested from the defendant; for the very same action is maintainable by the finder of goods against the person who wrongfully takes them from him, or by the carrier of goods for hire, or by the bailee of goods against a trespasser; and yet, in the three cases last put, the absolute property is not divested from, but still remains in, the true owner.

But it is argued at the bar, and that appears to be the main ground of argument, that the sheriff

having such special property, the extent can only take the goods of the debtor subject to such special property, just as goods in pawn can only be taken subject to the pledge, and lands mortgaged can only be taken subject to the claims, both legal and equitable, of the mortgagee. In those cases, however, the property has actually been altered by the act of the debtor himself, under an express contract made between himself and the other party, for the benefit of such other contracting party. It is a contract complete and consummate before the seizure under the extent. It is an alienation of the property, which amounts *pro tanto* to a sale. As, therefore, the Crown process could not seize upon property actually parted with and sold, so neither can it seize property so partially sold, except subject to the rights of the partial purchaser. But, in the case under consideration, no property has been parted with by the Crown debtor under any contract previously made. The goods are not sold; they are only in the way to be sold. It would be a better definition of the sheriff's relation to these goods to say, he has them in his custody under a power to sell them, than any actual interest or property in them. His situation, indeed, cannot be better defined than by saying the goods are *in custodia legis*, a phrase which plainly distinguishes a mere custody and guardianship of the goods from a change in the property. So far, therefore, as a special property in the goods is necessary for their safe custody against wrongdoers, and to render the execution of his public duty useful to the judgment creditor, so far he may be said to have the property; but beyond this, and as against the rights of adverse claimants, there is

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no authority for saying that he has any property at all. The only question can be, has the property passed from the debtor to any other person?

It has been further contended, that the decisions which have taken place under the statute 21 Jac. c. 29. s. 9. are authorities to shew that the execution is executed upon the mere act of seizure by the sheriff, and that the subsequent sale is no more than a formal completion of the execution. By that statute it is enacted, "that the creditors who have security for their debts, whether by judgment, statute, &c., whereof there is no execution or extent served and executed upon the lands and tenements, goods and chattels of the bankrupt, shall come in rateably with the other creditors." And it must be admitted, that under that statute various decisions have determined, that if the sheriff has once entered and seized, a subsequent act of bankruptcy, before sale, comes too late to vest the property in the assignees. It is contended, therefore, that by the seizure of the sheriff the execution is executed; and, undoubtedly, for the objects and purposes of that statute, the seizure must be taken to be a complete execution of that writ. That statute was passed before the statute of frauds, at a time when the property in the goods was bound, as against the bankrupt himself, and all claiming under him, by the mere suing out and teste of execution. In order, therefore, to obviate the manifest inconvenience which would result if plaintiffs were to lie by and conceal their writs, and afterwards bring them forward, when the effects of the bankrupt had been disposed of by the assignees under the commission, by which means they would give a false credit to the trader,

which it is the direct object of the eleventh section of that statute to prevent; that statute did, for that purpose, compel the plaintiff to put his writ into immediate operation, by making the seizure under the writ the utmost limit of any preference which he could give. But this affords no argument for the general position, that the seizure of the goods, and not the sale, does generally, and in all cases and for all purposes, alter the property. It was a particular provision, made to obviate a particular inconvenience.

It has further been contended, that the seizure under the writ is the completion of the execution; because it has been held that an execution is an entire thing, and cannot be superseded after it is once begun; and, therefore, if a writ of error is allowed after seizure, but before sale, it is no *supersedeas* of the execution, but the sheriff must, notwithstanding, sell the goods levied under the execution, and return the money into court to abide the event of the writ of error: *Meriton v. Stevens*.<sup>\*</sup> It seems, however, to me, that this rule of practice in the courts affords no grounds for such conclusion. In some of the old cases the Judges appear to have doubted whether the defendant should not have his goods again, when the writ of error was allowed after seizure but before sale; and the reason assigned for the affirmative of that proposition was, for that before sale the property remains in the defendant: *Shelton's Case*.<sup>†</sup> But in later cases, the Courts have thought it a better exercise of discretion to allow the money to be made under the writ, and brought into court, to abide the event of the writ of error. In this case,

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<sup>\*</sup> Willea, 271.

<sup>†</sup> Dyer, 67. b. in margin.

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it is to be observed, the suing of the writ of error is the act of the defendant himself, and the object is, to deprive the plaintiff of the fruits of his execution; and it is the laches of the defendant himself that he did not bring his writ of error before the seizure,—circumstances which make a manifest distinction between this case and that of persons who claim under any conflicting rights.

That the actual sale of property seized under the writ, issued at the suit of the subject, forms the dividing line, so that where the sale is complete before the awarding of the Crown process, the property is protected therefrom, but where it is not completed the property may be seized thereunder, appears from *Fleetwood's Case*, where the sale of a lease belonging to the Crown debtor, *bond fide* and without covin, before the award of execution for the King's debt, which is analogous to the teste of the writ of extent, was held to be good against the Crown, and that the Crown could not take it in execution: 8 Rep. 171. 2 Roll. Abr. 153. In that case no argument is offered that the seizure alters the property; the whole argument and the judgment of the Court rest on the fact of the actual sale. But, independently of any argument upon principle, a very long series of cases, from the earliest time down to the present, with the exception of the two cases only, which have been so often referred to, viz. *Uppom v. Sumner* and *Rorke v. Dayrell*, establish the position, that if the subject seizes his debtor's property, either under a writ of execution, a distress, or any other mode which the law allows for the satisfaction of a debt or demand, and an extent issues at the suit of the Crown, whilst the goods remain in

*specie*, and before any thing is done to change the ownership, it is part of the prerogative of the Crown to treat this seizure as a nullity, and to proceed to the satisfaction of the Crown debt out of the goods so seized. The first authority is *Stringfellow's Case*, 3 Edw. 6., the more valuable, because it took place little more than six years after the passing of the statute 33 H. 8., at a time, consequently, when the object and intention of that statute, and the meaning of its provisions, must have been familiar to all the Judges who were present at its decision. In that case, the four Barons of the Exchequer, and two of the Judges, namely, Bromley, one of the justices of the King's Bench, and Hales, one of the justices of the Common Pleas, were of opinion that the actual taking of the goods of Brownsoppe, the debtor, by the sheriff, under an *extendi facias* out of Chancery upon a statute staple, and the seizing them into the hands of the King, but without delivering them to the plaintiff, was no answer to the prerogative writ at the suit of the Crown out of the Exchequer, but that the sheriff was bound out of such goods to satisfy the King's debt. And the reason assigned by the reporter for the opinion of the Judges is, "because the property in the goods "and lands was not in Stringfellow before they "were delivered to him by the liberate." It has been said, however, that this case is to be considered as subject to doubt, on account of the *quære* subjoined to it by the reporter. But it is to be observed on the other hand, that Rolle inserts the case in his Abridgement\* without the

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\* 2 Roll. Abr. 158.



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*quære*, expressly stating, "that the sheriff ought "to execute the extent for the King's debt, be- "cause the property of the goods and lands was "not in Stringfellow before they were delivered "to him by a writ of liberate, and therefore liable "to the King's extent;" and that Lord Hobart, in *Sheffield v. Radcliffe*\*, affirms the case to be law.

Again, Treby C. J., in a marginal note to the report, states, that the Barons of the Exchequer agree that this case is law; and the case itself is cited and relied upon as law, in the *King v. Cotton* †, where the Chief Baron, in the very elaborate and able judgment upon that case, states, "that he "will shew Stringfellow's case to be undoubtedly "law;" and, amongst other instances in which he states it to be recognized, he mentions that Lord Hardwicke, when Chief Justice, in delivering the resolution of the Court of King's Bench, in *Brassey v. Dawson*, Mich. 6 G. 2., cited and relied upon Stringfellow's case as clear law, and said, it was grounded on the general rule of preference allowed by law to the King's debts.

The case of *The King v. Cotton*, which was decided in 1751, was determined on the very same principle which applies to the present case. In that case, the goods of Chapman, the King's debtor, were seized under the distress for rent on the 12th of October. On the 14th of October, after the seizure, but before the sale, the extent issued. The Court of Exchequer held, that the property in the goods was not altered by the distress, but, until the time of actual sale, remained in the King's debtor, and was liable to the oper-

• Hob. 399.

† Parker, 112.

ation of the writ of extent. How can any real distinction be made between the landlord seizing the goods for the purpose of making his rent by a subsequent sale, and a sheriff seizing under a *feri facias* for the purpose of making the plaintiff's debt by a subsequent sale? or, if there is any distinction, is it not stronger in favour of the landlord, who might reasonably be supposed to have acquired a special property, when he seized for his own benefit? Indeed, both the argument and the judgment in that case proceed on the assumption, that the present case is in favour of the Crown, and that it could not be disputed but that the extent would operate upon goods seized by the sheriff, but not yet sold. Again, in *The Attorney-General v. Capel*, determined in the Exchequer in 1686 \*, where the extent was tested the 24th of December, after a commission of bankrupt had issued against the debtor, but before the assignment made by the commissioners, it was held by the Court, that if the extent comes before the assignment, it shall and must be preferred; and the case of *The King v. Crump and Hanbury* is cited, and relied upon as an authority in point, to which the reporter adds this observation:—“ Ex-  
 “ tents have been held good that have been made  
 “ upon goods actually levied by virtue of a *feri*  
 “ *facias*, and in the sheriff's custody, the extent  
 “ coming before a bill of sale made, so as the pro-  
 “ perty was not altered.”

These two cases, therefore, are direct authorities: the one, that in the case of a distress, where goods are *in custodia legis*, after the seizure but before the sale; and again, in the case of a bankrupt,

\* 2 Show. 481.

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where goods are also *in custodia legis*, between the seizure by the messenger and the actual assignment by the commissioners, still the goods of the King's debtor are subject to an extent at the suit of the Crown, tested before the actual sale under the distress, or before the actual assignment to the assignees; and the just inference would seem to be, that, in the case of seizure by the sheriff under a *feri facias*, where the goods are also *in custodia legis*, an extent tested before the sale ought to be entitled to the same operation. But Stringfellow's case, acknowledged as it has been in various and repeated instances, and by the most eminent Judges, is a direct authority on the very point now under discussion; and, since that decision, various other cases have been decided in the same way, and after great argument, by the Court of Exchequer. I refer particularly to *The King v. Wells and Allnut*\*, in 1805, and to the case of *Rex v. Sloper and Allen*†, where the Exchequer acted on the authority of the latter case.

The only two cases which have received a contrary decision are those before referred to, viz. *Uppom v. Sumner*‡, in Easter Term 1779, by the Court of Common Pleas; and *Rorke v. Dayrell*§, in 1793, by the Court of King's Bench; cases undoubtedly entitled to great respect, when the authority of the eminent persons by whom they were adjudged is taken into consideration. I say, these two cases only have received a contrary decision; for I cannot consider the case of *Lechmere v. Thoroughgood and Another*||, which is sometimes

\* 16 East, 278. in a note.

† 6 Price, 114.

‡ 2 W. Bl. 1251.

§ 4 T. R. 402.

|| 3 Mod. 236.

cited, to be an authority upon the present question between the Crown and the subject. That was an action of trover by the assignees of a bankrupt against the sheriff, who had entered under a *fi. facias*, and upon a special verdict one of the questions was, whether the *fi. fu.* was well executed, the sheriff having seized though not sold under the writ, before the commission of bankrupt had issued; and upon that question it was held, that the *fi. facias* was well executed, so that the assignees of the bankrupt's estate could not have a title to those goods which were before taken in execution, and therefore *in custodia legis*. So far, undoubtedly, the case is an authority. But it was further stated in the special verdict, that, after seizure under the *fi. facias*, and before any *venditioni exponas*, viz. on the 4th of May, an extent in aid issued, whereupon parcel of the goods mentioned in the declaration was seized by the sheriffs upon the same extent, and sold, and the money paid to the creditor. And one question stated by the reporter is, whether the extent did not come too late? and he says it was held that it did. Now, upon this point the case cannot be an authority, for the priority between the extent and the *fi. facias* was perfectly immaterial to the plaintiffs in that action: they were out of court upon the title of the judgment creditor. All further discussion was *res. inter alios acta*; no one appeared for the Crown; no argument took place before the Court on behalf of the Crown. The only inference, therefore, to be drawn from that case is, that the plaintiffs, the assignees, had no right against the judgment creditor; but whether the Crown, who had received payment out of part of the goods seized, had such

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right or not, is left undetermined, and indeed untouched.

The question, therefore, is, whether the two cases above referred to are of such authority as to overturn the decisions which both before and since have been given by the Court of Exchequer. These two cases, as I have already observed, are decided, partly upon the ground that the property in the goods is altered by the seizure under the *fieri facias*, and partly upon the ground that, by the statute 33 H. 8. c. 39., such a restriction was put upon the King's prerogative, that the preference now contended for ceased to exist. And these are the only grounds upon which these cases are rested.

As I have already stated the reasons for the opinion which I have formed, that no alteration takes place until the actual sale under the *fieri facias*, I shall confine my remaining observations to the consideration of the second point in this case, namely, the statute of H. 8. By the 33 H. 8. c. 39. s. 74., it is enacted, "that if any suit be  
" commenced or taken, or any process be hereafter  
" awarded for the King, for the recovery of any  
" of the King's debts, the same suit and process  
" shall be preferred before the suit of any person ;  
" and the King shall have first execution against  
" any defendant, of and for his said debts, before  
" any other person ; so always that the King's said  
" suit be taken and commenced, or process awarded  
" for the said debt at the suit of the King, before  
" judgment given for the other person."

That this clause of the statute is not to be interpreted according to the strict letter of it, has been at all times admitted. Taken literally, it would

give the subject a greater advantage against the execution at the suit of the Crown than he possessed against that of any subject. If the subject has obtained judgment before the teste of an extent, such judgment, according to the letter of the statute, would postpone the Crown's remedy under the extent for an unlimited time, whereas the same judgment would have no operation whatever against an execution at the suit of a subject, even though issued in a suit which was commenced after such judgment was signed. In the case of the Crown, the subject's judgment would give him the preference, though his execution were last in point of time. In the case of a subject, the first execution against the goods must be preferred. The exact literal sense of the statute must, therefore, be departed from; and if that sense is once given up, we are at liberty to adopt that which appears to be the nearest to the letter of the statute, and, at the same time, which best carries into effect the object and intention of the legislature. For this purpose, it should be considered what the exact state of the prerogative of the Crown was at the time this statute was passed, in order that we may be the better able to judge how much of it was intended to be abolished by the statute. By the ancient prerogative of the Crown, as stated by Lord Coke, in 1 Inst. 131 b., "the King was to be preferred, in payment of his duty or debts by his debtor, before any subject, although the King's debt or duty be the latter; and the reason hereof is, for that *thesaurus regis est fundamentum belli et firmamentum pacis*, and thereupon the law gave the King remedy, by writ of protection, to protect his debtor, that he should not be sued or attached

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“until he paid the King’s debt.” So the law remained until the statute 25 Edw. 3. c. 19., which was introduced, as Lord Coke says, “from the inconvenience that grew, that for to delay other men of their debts the King’s debts were the more slowly paid.” By that statute it was enacted, “that, notwithstanding such protections, the parties which have actions against their debtors shall be answered in the King’s Court by their debtors; and if judgment be thereupon given for the plaintiff or demandant, the execution of the same judgment shall be put in suspense till gree be made to the King of his debt; and if the creditors will undertake for the King’s debt, they shall be thereunto received, and shall have execution against the debtors of the debt due and adjudged to them, and also shall recover against them as much as they shall pay to the King for them.” The law, therefore, at the time of passing the statute H. 8., was, that although the King granted his protection to his debtors, the subject might nevertheless sue his debtor, and continue his suit to judgment, but still the execution was suspended until the King’s debt was paid. The Crown, therefore, might still postpone the execution of the subject to an unlimited time, simply by delaying to take out execution in its own suit; but, by the statute of H. 8., this power of the Crown to postpone the execution of the subject’s judgment to an unlimited time is taken away, except in one single case, viz. where the suit of the Crown is commenced before the judgment has been obtained by the subject. In that case, I consider the old prerogative still remains. Since the statute, therefore, where the Crown has commenced its suit before the sub-

ject's judgment, there can be no race between the Crown and the subject which shall sue out the first execution: the debt of the Crown must be first satisfied before the subject can execute his writ. But where the Crown has not commenced its suit or awarded its process, before the subject's judgment is signed, there the field is open both to the Crown and the subject; and if the subject can first complete his execution, before the Crown issues its writ, he may enjoy the fruit of it. Still, however, even in this case, if the execution of the Crown is concurrent with that of the subject, if it is actually issued before the subject's execution is complete, the statute of H. 8. does not provide for the case, but leaves the old common-law rule to operate "*quando jus domini regis et subditi concurrunt, jus domini regis preferri debet.*" The rule of law has always been, that the prerogative of the Crown cannot be taken away, except by express and unambiguous words; but it is difficult to find any words in the statute which will apply to two writs of execution in competition with each other, — one at the suit of the Crown, the other at the suit of the subject. It is enough, however, to say it is left in doubt; for, at the time in which this statute passed, it is impossible to believe such a prerogative was abandoned by the Crown, if there are no express words to shew the intention.

After all, the important point is, that the line should be distinctly drawn and well defined, which forms the boundary between the right of the Crown and the right of the subject, with respect to executions of the subject's judgments. It is admitted on all hands, that if the extent issues before the seizure it is entitled to the preference. Suppose

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the sheriff actually seizes, and the extent then issues, and the law says, that, as it issued before the sale, it is to be preferred? The expense of the entry and execution will not fall upon the plaintiff in the action, for his debt has not been levied; those expenses will be allowed by the Exchequer, upon payment of the King's debt. The only consequence is, that the subject discovers a very few days later that his execution cannot be satisfied until the Crown debt is paid.

For these reasons, the opinion which I have formed upon the first question proposed to us is, that the actual sale under the *feri facias* forms the dividing line between the right of the Crown and the right of the subject; and, consequently, that the extent is, in the present case, to be preferred to the writ of *feri facias* issued at the suit of the subject.

Upon the second question proposed by your Lordships I shall say no more, than that it appears to me to make no difference whether the extent is an extent in aid, or an immediate extent at the suit of the Crown; all the authorities agreeing that the same privileges extended to the one which belong to the other.

I have the authority of Mr. Justice Park, who is unavoidably absent on this occasion, to express his entire concurrence with the opinion formed by the majority of his Majesty's Judges.

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*Lord Tenterden C. J.*—My Lords, in the case between Daniel Giles, the late sheriff of the county of Hertford, plaintiff in error, and Harry Grover and James Pollard, defendants in error, which was argued some time ago before your Lordships, the

learned Judges have given their answer to certain questions that were proposed to them by the House. By these answers, a very great majority of the Judges coincided in that opinion, upon which I propose to submit to your Lordships that the judgment of the Court of Exchequer should be affirmed, two only being of a different opinion.

The case may be shortly stated thus:—An execution having issued at the suit of a subject, the sheriff took possession of the goods of the debtor; but before he made any disposition of these goods by bill of sale to the creditor, or in any other way, an extent came at the suit of the Crown; and the question is, whether an extent thus coming at the suit of the Crown, while the goods remain in the hands of the sheriff, is to be preferred to the execution taken out by the subject. The majority of the Judges, on the question proposed, are of opinion in the affirmative, namely, that the Crown's extent should be preferred. It is in conformity with that opinion, in which I most heartily concur, and have long entertained, for the subject is by no means new in the courts of justice, that I shall take the liberty of delivering my opinion that the judgment of the Court of Exchequer should be affirmed.

As I have already stated, the question has arisen more than once in courts of law, and there are two recorded decisions in two cases, so often alluded to upon the subject; one, of the case of *Uppom v. Sumner*, decided in the Common Pleas several years ago, and the other the case of *Rorke v. Dayrell*, decided in the Court of King's Bench, after the decision of the other case. Not to notice the prior decisions in the Court of Exchequer, it may be sufficient for the present to say, that there have,

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since the last of these decisions, namely, the decision of *Rorke v. Dayrell* by the Court of King's Bench, been two or three decisions in the Court of Exchequer to the contrary of those two prior decisions.

Your Lordships well know that the Barons of the Court of Exchequer are very peculiarly conversant with the revenue of the Crown. It is their peculiar duty to attend to and enforce the rights of the Crown against the subject, as connected with that revenue.

The two cases which are reported, and which are against the rights of the Crown, appear to have proceeded upon two grounds: one ground was, that, by the seizure of the sheriff, the property of the goods was divested out of the debtor; another ground was, that, according to the true interpretation of the statute passed in the time of H. 8., the execution of the Crown was not to be preferred.

Now, with regard to the first point, namely, the supposal that the property was divested out of the debtor by the seizure of the goods: by the act of the sheriff in seizing the goods, it appears to me, upon due consideration, and so the majority of the Judges thought, that the proposition could not be maintained. Property cannot be divested out of one person, without being vested in another; and it is impossible to say in whom the property does become vested, if the investment be taken out of the debtor. It has been argued, that the property is vested in the sheriff, because there are authorities to shew that the sheriff, if the property be taken out of his hands, may maintain an action of trover against the wrongdoer. These actions are

maintainable upon a ground perfectly distinct from the right of property; they are maintainable upon the ground of possession. Any man in possession of goods, whether as the bailee or otherwise, may, in his own name, maintain an action. The power, therefore, of bringing an action of this kind does by no means prove that the property is in the sheriff.

It has been supposed by some, that the property is in the judgment creditor; but it is perfectly clear, upon consideration of the subject, that the judgment creditor has no property in the goods while they remain in the hands of the sheriff. If the sheriff executes the process of the Court, and makes a bill of sale to the plaintiff in the action, then the judgment creditor obtains the property; but until that is done, while the goods are in the possession of the sheriff, they are in the custody of the law, but still remain the property of the debtor to whom they originally belonged. If the property were divested, some ceremony would be necessary to revest it; but there is no ceremony. If the debtor pays the money to the sheriff, the sheriff withdraws; he executes no conveyance, he does not even go through any ceremony, but all he does is to withdraw, and leave the goods where they were. It appears to me, therefore, that, putting the case shortly upon that ground, of a supposed divesting of the property, it can by no means sustain the two cases which I have referred to, and which decided against the right of the Crown.

It remains to consider the effect of the statute upon which so much reliance was placed. That was the statute passed in the reign of H. 8.; and, upon the first view of it, considering that statute by itself, and without regard to the state of the

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law as it previously existed, it might seem that the argument founded upon it was correct. By that statute it is enacted, "That if any suit be commenced, or any process be hereafter awarded for the recovery of any of the King's debts, the same suit and process shall be preferred before the suit of any person or persons, and the King, his heirs and successors, shall have first execution against any defendant or defendants, of and for his said debts, before any other person or persons, so always that the King's suit be taken and commenced, or process awarded for the said debt at the King's suit, before judgment given for the said other person or persons."

As I have already intimated, if that statute were read without regard to the state of the law as it existed at that time, it certainly would furnish an argument against the right of the Crown; but that act of parliament, like every other, is to be construed with regard to the state of the law as it previously existed; and so construing that statute, it will be found not to apply to a case like the present.

By the common law, the King had a right of preventing any subject from suing any of his debtors; it was the practice, and a right was sometimes exercised, of granting to those who were his debtors a protection which prevented any of his subjects from bringing any suit against them. Thus the law stood until an act of parliament passed, which I shall draw your Lordships attention to, namely, the statute of the 25 E. 3. c. 19. That statute shews what the law was before it was passed, and introduces an alteration in favour of the suitor, and it is in these terms: "For-

“asmuch as our Lord the King hath made before  
 “this time protections to divers people which were  
 “bounden to him in some manner of debt, that they  
 “should not be impleaded of the debts which they  
 “owed to other, till they had made satisfaction to  
 “our Lord the King of that which to him was due  
 “by them by reason of his prerogative, and so during  
 “such protections no man hath dared to implead  
 “such debtors.” Your Lordships will observe, that  
 the preamble recites the law to be as I have stated  
 it, namely, that the King by his protection was in  
 the practice, and had the right to prevent any  
 person from commencing any suit against his  
 debtor. Then it goes on to enact: “It is accorded  
 “and assented, that notwithstanding such protec-  
 “tions, the parties which have actions against their  
 “debtors shall be answered in the King’s Court by  
 “the debtors; and if judgment be thereupon given  
 “for the plaintiff or demandant, the execution of  
 “the same judgment shall be put in suspense till sa-  
 “tisfaction be made to the King of his debt; and if  
 “the creditors will undertake for the King’s debt,  
 “they shall be thereunto received, and moreover  
 “shall have execution against their debtors of the  
 “debt due to them, and also shall recover against  
 “them as much as they shall pay to the King for  
 “them.” This statute, therefore, so far altered the  
 law, as that it enables the subject to bring an action  
 against his debtor, although he be a debtor to the  
 Crown, which before he could not do; but never-  
 theless it prevents him from taking out execution,  
 unless he first satisfies the debt of the Crown.

This was the state of the law before the passing of  
 the statute to which I have referred, namely, the  
 statute of 33 H. 8. The subject might commence

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an action, and might have proceeded even to judgment, but could have no execution without satisfying the King's debt. All, therefore, that the statute of H. 8. does, is to allow a party to have execution without satisfying that debt; it authorizes him to take out his writ, but does not apply to a case in which there are conflicting executions, which is the case in question. If it should be taken literally, that the King should not have execution unless his suit were commenced before a judgment given for the subject, the consequence would be, that the subject might obtain judgment against the King's debtor, and forbear taking out execution for a considerable length of time, and during all that time prevent the Crown from recovering its debt; by taking out execution, they would be open to collusion on the part of the subject, and operate to the great prejudice of the King's revenue and his rights.

I am therefore of opinion, that the true effect of this statute is to allow the subject to obtain judgment, and even to sue out execution, without first making satisfaction to the King, but nevertheless to leave the law in all other respects as it stood before; namely, if the King's execution comes while the goods remain the property of the debtor—(and, as I have already stated, my opinion is, that they do remain the property of the debtor, although they be taken possession of by the sheriff,) the King's execution shall prevail. The contrary of that has been decided in the two cases of *Uppom v. Sumner*, and *Rorke v. Dayrell*; but there are two or three decisions of the Court of Exchequer in accordance with my view of the subject. I do not know that it is necessary to trouble your Lordships with re-

ferring to those cases; they were very much considered in the Court of Exchequer, and the decision in one of them afterwards became the subject of enquiry in the Court of King's Bench. The case is reported by the name of *Thurston v. Mills*: the point of law which is the question in the present case, was twice argued before that Court; and a third time upon a question preliminary to the question argued on the two first occasions, and which was really the question in the cause. Upon that preliminary question, which regarded only the form of the action, the Court of King's Bench decided against the plaintiff. The main question was there left untouched; but I think it may be collected, though not very clearly, that the opinion, at least of some of the Judges who sat in the Court at that time, — Lord Ellenborough being at the head of them, and Mr. Justice Le Blanc being one of them, — was in favour of the Crown. I cannot assert positively that it was so; but in reading the report of the case, and from my own recollection of the question introduced into the argument of it, I am strongly inclined to think that it was so, and I formed that opinion at the time.

The ground upon which these two decisions of *Uppom v. Sumner*, and *Rorke v. Dayrell*, have proceeded, as to the divesting of the property out of the debtor and vesting it in another, failing, in my opinion; and the argument also that was founded upon the construction of the statute of H. 8. failing, on a due consideration of that statute with regard to the law as it existed before, my opinion is, that the Crown has a right of priority in this case before the subject, and consequently, that the judgment of the Court of Exchequer must be

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affirmed. I should further say, that, according to the practice at that time, although the law has been altered, the judgment of the Court of Exchequer in this case was removed by a writ of error, and argued before the Chief Justices of the King's Bench and of the Common Pleas, of whom I was one, and my Lord Wynford the other : we did not come to the same conclusion upon that occasion ; and therefore we affirmed the judgment, understanding, and meaning, that the question, which was one of great importance, should be brought to this House. I have since conferred with my Lord Wynford upon the subject ; and I have learned from him, that he is now perfectly satisfied with the opinion which I have ventured to give to your Lordships, and by which I propose to affirm the judgment of the Court of Exchequer.

The Lord Chancellor, upon a review of the authorities, said, that he entertained a strong opinion that the judgment of the Court of Exchequer in this case was right, and ought to be affirmed : that he concurred in the opinions pronounced by the majority of the learned Judges, in answer to the questions put to them : and that the settlement of the question was of more importance, than the mode in which it should be settled.

Judgment affirmed.

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## APPENDIX.

## SCOTLAND.

(COURT OF SESSION.)

ALEXANDER BAILLIE - - - *Appellant.*MISS MARGARET GRANT - - - *Respondent.*

B., who was indebted to G. in a sum exceeding 100*l.*, became a trader in Scotland, and after the discontinuance of his trade, but before the concerns of his trade were wound up, and being still indebted to G., committed an act of bankruptcy: Held, that he was liable to a sequestration as a notour bankrupt, upon debt, trading, and act of bankruptcy.

THE Respondent inherited the estate of Pilmuir as co-heiress with the wife of the Appellant and another sister. After the marriage of the Appellant, various transactions regarding the family interest took place among the parties. In particular, two actions were raised against the Appellant and his wife, regarding his intromissions with the rents of Pilmuir: the one by Miss Jean Grant and her trust-assignee, for 798*l.* 1*s.* 10½*d.*; the other by the Respondent, Miss Margaret Grant, and her

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trust-assignee, for 1291*l.* 15*s.* 3*d.* During the dependence of these actions, viz. on the 8th and 14th of January, 1812, the parties submitted their whole mutual questions and claims, and, in particular, the two actions above mentioned, to Mr. Charles Ferrier, accountant in Edinburgh, who, on the 20th of October, 1812, after having heard the parties, and considered the whole accounts and other documents produced, especially those relating to the two actions above mentioned, decreed against the Appellant for the sum of 1197*l.* 15*s.* 3*d.*, and 24*l.* 1*s.* 2*d.*, with interest from the 1st of June, 1812, in favour of the Respondent; and for the sums of 280*l.* 4*s.* 9½*d.*, 316*l.* 14*s.* 6*d.*, and 1*l.* 3*s.*, with interest from the 1st of June, 1812, in favour of Miss Jean Grant. The liferent of the two last sums belonged to the Respondent, under the settlement of Miss Jean Grant, who died in November, 1815. And the Respondent was otherwise creditor of the Appellant. No part of these principal sums, or of the interest upon them, had been paid to, or received by, either the Respondent or her trust-assignee, or in any way compensated. The Respondent, by a deed of retrocession from her trust-assignee, dated the 2d of September, 1830, was re-invested with full right to the sums contained in the decret-arbitral.

In 1819, the Appellant, having in his hands the above mentioned principal sums and interests of the Respondent, began business as a grocer and spirit-dealer. in the Canongate of Edinburgh. In this business, which the Appellant continued for some time, the funds and termly interests of the Respondent were embarked with his own property. The business then carried on by the Appellant had

been discontinued, but was not wound up at the date of the proceedings below, nor had he produced any state, discharge, or other evidence to shew that his affairs were brought to a conclusion. Debts then owing and debts contracted in his business were not discharged. Besides the claims of the Respondent and of the trustees of her sister, and claims at the instance of other parties, various taxes, rent, wages, and other debts, were paid for the Appellant by his brother, Mr. Thomas Baillie, solicitor, in Edinburgh, and formed part of claims made judicially and otherwise on the Appellant at the instance of his brother or others in his right.

The Appellant, as alleged, was, on the 12th of March, 1830 (*i.e.* at the date of the petition for sequestration), insolvent, notour bankrupt, and liable to sequestration under the statute.

As the submission and decret-arbitral above mentioned, both containing clauses of execution, had been mislaid, the Respondent brought an ordinary action against the Appellant in 1829, for the sum of 1197*l.* 15*s.* 3*d.*, decerned for as above, being prepared to prove the tenor of the documents missing. During the dependence of that action, however, they were recovered. The Respondent immediately relinquished the ordinary action, and raised diligence on the decret-arbitral against the Appellant. In September, 1829, he was charged at the instance of the Respondent, upon the decret-arbitral, to pay the above mentioned sum of 1197*l.* 15*s.* 3*d.* He was denounced, upon letters of horning, on the 20th of January, 1830, and the Respondent raised letters of caption against him on the 22d of January, 1830. But he was not incarcerated under them, as, on the 19th

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of January, 1830, he had retired to the Sanctuary, the protection of which he pleaded when apprehended there by a messenger on the 5th of March, 1830, under the above caption, for the purpose of rendering him notour bankrupt. A year or two before the date of the appeal, the Appellant succeeded, by the death of a brother, to a large sum of money, which was invested in government stock.

The Respondent, who had previously adjudged a house belonging to the Appellant (in value about 550*l.*), presented to the Lord Ordinary on the Bills for the Court of Session, on the 12th of March, 1830, a petition for sequestration of his estate under the bankrupt statutes.

To this petition the Appellant gave in answers, in which he pleaded, *first*, That the claims of the Respondent did not render her a creditor qualified to apply for sequestration. *Second*, That he had not the character requisite to sequestration of his estate under the statutes.

The case having been thereafter prepared, and the record closed, on revised condescendence and answers and notes of pleas, the First Division of the Court, on the 20th of May, 1830, sequestrated the estate of the Appellant by the following interlocutor: — “ *Edinburgh, 20th of May, 1830.* — “ The Lords having advised this petition, with the “ answers given in thereto, and the closed record, “ and having heard the counsel for the parties, “ they repel the objections, sequesterate the whole “ estate and effects of the said Alexander Baillie, “ in terms of the statute; appoint the creditors to “ hold two meetings at the place and times specified in the note, and for the purposes mentioned

"in the petition, as directed by the statute; grant  
 "commission as prayed for; ordain the petitioner  
 "to advertise the sequestration, and times and  
 "place of the meetings, in the Edinburgh and  
 "London Gazettes, in the usual form." (Signed)  
 "C. HOPE, *I. P. D.*"

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Against this judgment the Appellant presented a petition of appeal. The case was argued before the House on the Judges being in attendance.

The authorities cited were, for the Appellant, *Dick v. Lyell*, F. C. 28th January, 1815. *Low v. Craw*, in a note to the above case. *Cramond v. Hogg*, 21st February, 1815. *Cook v. Cuthil's Trustees*, 21st February, 1829. Bell's Comment. vol. ii. p. 316. 5th edit.

For the Respondent, Bell's Comment. ii. 316. 5th edit. *Dick v. Lyell*, 28th January, 1815. F. C. p. 180. No. 46. *Low v. Craw*, 8th July, 1815. F. C. Note to *Dick v. Lyell*, *supra*. *Cramond v. Hogg*, 21st February, 1815. F. C. p. 231. No. 61. *Cook v. Cuthil's Trustees*, 21st February, 1829. F. C. and Sh. and D. See also Sess. Paper, No. LXXXVII. F. C. Recl. Note and Record. *Young v. Baillie*, pp. 4. and 14. No. 14. Process.

At the conclusion of the argument the following questions were put to the Judges:—

A., not a trader, becomes indebted to B. to the amount of 100*l*. A. afterwards becomes a trader, and ceases to be a trader, never having paid his debt to B. After ceasing to be a trader he commits an act of bankruptcy. Can B. support a commission against him, upon his debt, and that act of bankruptcy?

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The unanimous opinion of the Judges was delivered by *Tindal C. J.*

Upon this question, the Judges, who have heard the argument at your Lordships' bar, are of opinion that a commission may be supported against A. upon the debt and act of bankruptcy above supposed.

It has been decided, and has long been considered as law, that a debt contracted *before* a man enters into trade, but continuing unpaid at and after the time he is in trade, is a sufficient debt to support a commission taken out against him, upon an act of bankruptcy committed whilst he is a trader. (See the case of *Butcher v. East*, Dougl. Rep. 295.)

It has also been established beyond dispute, that a petitioning creditor's debt, contracted during the trading of the debtor, will support a commission taken out against him on an act of bankruptcy committed after the trading has ceased: this point has been settled to be law by various decisions, commencing with that of *Heyler v. Hall*, Palmer's Rep.. 325, and ending with that of *Ex-parte Bamford*, 15 Ves. jun. 458.

But it is contended, that although each of these propositions be true separately, yet that no inference can be drawn from them, that the debt contracted *before* the trading, but subsisting during its continuance, and the act of bankruptcy committed *after* the trading, will support a commission. We think, however, that no valid or substantial distinction in this respect can be drawn between the debt contracted before, and that contracted during, the trading.

The debt contracted before trade, but remaining

unpaid at and after the time the debtor enters into trade, appears to us to be a subsisting debt for every purpose, and subject to every consequence which belongs to a debt originally contracted during trade.

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It is the same with respect to the trader's ability to carry on his trade. The money lent to the person who afterwards commences trade, may be, and often is, the very capital upon which the trade itself is carried on. At all events, the credit given to the trader by the forbearing to demand repayment, is one of the sources from which such capital is derived, and is the same, in effect, as a new loan. Again, the debt is attended, in both cases, with the same consequences as to the trader's ability to repay it; for, in each, the power of repayment is equally affected by the success or failure of the trader. No one would contend, that a debt contracted during the period of trading, though not a *trade debt*, but contracted for private purposes, and applied to private occasions, perfectly distinct from the trade, is to be considered as differing, in any respect, from a debt contracted in the course of the trade itself. It seems, therefore, rather an artificial distinction, than a substantial difference, to hold, that the debt contracted after the trading has commenced, shall support the commission taken out on an act of bankruptcy committed after the trading had ceased; but that the debt contracted before the trading, but continued afterwards, shall not be attended with the same consequence. If a commission cannot be supported under these circumstances, a trader, by giving up his trade, which is a voluntary act on his part, would have the power of depriving his



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former creditors of the benefit of the bankrupt law by enforcing an equal distribution of his effects amongst all his creditors, and would be enabled to pay his subsequent creditors out of the very funds furnished or increased by those who were his creditors before he began trade: and upon referring to the bankrupt acts, there does not appear to be any distinction created between these two classes of creditors, as to the right to petition for a commission.

The first statute which mentions a commission, is the 13 Eliz. c. 7. § 2., which states, in the most general terms, "That the Lord Chancellor for the time being, *upon every complaint made in writing* against such person or persons being bankrupt, as is before defined, shall have full power, by commission under the great seal, to name, assign, and appoint the persons therein described." And all the subsequent statutes contain an enactment similar in effect to that in 6 G. 4., the present bankrupt act, viz. that the Lord Chancellor shall have power, upon petition made to him in writing, against any trader having committed an act of bankruptcy, "by *any creditor* or creditors of such trader," to issue his commission: words which comprehend equally all creditors for debts existing during the trading, whether contracted before or after the commencement of the trading.

The principal stress of the argument at your Lordships' bar was placed, first, upon the precise language used by the Judges in the cases above referred to, wherein they assign the reason for their opinion, that the debt *grew during the trading*. But in these cases the Judges speak with reference

to the particular facts of the cases immediately before them; and such expression affords no necessary inference, that, if the cases now under discussion, had, like the present, been cases of a debt remaining and continuing during the trading, their conclusion drawn from the other facts would not have been precisely the same. Again, it has been argued, that the statutes only authorise the suing out a commission against a person *using the trade* of merchandise by buying and selling, &c.; and that the ground upon which a commission is allowed to be sued out on act of bankruptcy committed by the debtor after he has ceased to trade, is, that he cannot be considered as having left off trade whilst any of the debts contracted during trade are still unpaid. But if the debts contracted before, but continuing after, are virtually and substantially the debts of the trader, whilst a trader, as we think they are, the words of the statute which are allowed to extend to the one, ought, in reason, to be held to include the other also.

Upon the whole, we think, that both upon the reasonableness of the thing, and also upon the proper construction of the bankrupt acts, a commission may be well supported under the circumstances supposed in the case submitted to us by this House.

*The Lord Chancellor.*—As this case turned upon a principle applicable equally to Scotch and to English cases of bankruptcy, and there was no decision upon the question exactly in point, it was deemed a proper case to be submitted for the opinion of the Judges. In the opinion now given I entirely concur, and propose to move that the judgment should be affirmed—but without costs, as it is a new case.

Judgment affirmed.

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## SCOTLAND.

(COURT OF SESSION.)

CATHERINE MUNRO, or ROSE and	} <i>Appellants,</i>
HUGH ROSE her Husband, for his	
Interest - - - - -	
JOHN SAUNDERS, otherwise ROSE,	} <i>Respondents.</i>
and his Curators - - - - -	

R., by birth a Scotchman, and holding land in Scotland, which he visited occasionally, but being domiciled in England, cohabited with an English woman, by whom he had a natural son. After the birth of the child he went to Scotland, and there, after a residence of fifteen days, married the mother, according to the forms of law in Scotland, and remained there visiting his friends and superintending his estates for about two months, when he returned with his wife and child to England, where they remained domiciled until his death: Held, that the child was not heir to the reputed father so as to inherit lands in Scotland.

THIS case arose upon a proceeding in a declaration of bastardy, instituted by the Appellant against George Saunders or Ross; and the legitimacy or illegitimacy of the Respondent was the sole question in the cause and appeal.

The facts of the case, found by the Court below, as admitted by the parties, or averred, and not denied or proved, were as follows:—Alexander Ross, by birth a Scotchman, went, in early life, to London, and settled there in business, as an

army agent: that in the year 1786, he succeeded to the entailed estate of Cromarty, in Scotland, and also inherited a paternal estate in Scotland, called Overskibo; and was inrolled as a freeholder in two of the counties of Scotland: that after he went to England he resided either in London or its neighbourhood, until his death, in 1820: that during all that period he occasionally visited Scotland, for the purpose of voting, as a freeholder, at elections; granting leases of his lands; for amusement, or upon visits to his friends; and, in particular, that at the time of his marriage (after stated) he came to (and abode in) Scotland for about four months: that Alexander Ross and Elizabeth Woodman, the Respondent's mother, were regularly married at Leith, on the 10th of June, 1815; after which he went to his estate of Cromarty, in the north of Scotland, accompanied by the Respondent, and resided there for some weeks: that subsequent to the marriage the Respondent was treated by the parents as their lawful son, and was so styled in the deeds of settlement executed by Alexander Ross, according to the forms of law in Scotland.

The action of declaration was commenced in the proper jurisdiction, the Consistorial Court of Commissaries, where judgment was given for the Respondent; and upon a bill of advocation (appeal) to the Court of Session, the judgment of the Commissaries was affirmed. The appeal to the House of Lords was against these judgments.

For the Appellants, Mr. *Jeffrey* (Dean of Faculty) and Dr. *Lushington*.

For the Respondents, Mr. *Brougham*, Mr. *Key*, and Mr. *Dundas*.

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The authorities cited were as follows : —

For the Appellant, — Huber. *Prælect. de Conflictu Legum*, 2. 1. 3. § 8. 10. 12. Burgundus ad *Consuet. Fland. Trait.* 3. No. 12. P. Voet. *de Stat.* p. 138. Hertius *de Collis. Leg.* 1. 4. 8. Hofacher, *Princ. Jur. Civ. Rom.* i. p. 112. 114. Merlin *Rep. de Jurisp. tit. Legitimat.* Vooeda *de Stat.*, 3. 47. in *Bib. Fac.* Pothier, *Introd. au Cout.* § 2. *Cod. de Incolis Dig. ad Municipalem*, L. 50. tit. 1. Muller, *Prompt. tit. Domicilium, et tit. Forum, Contract.* Boullenois, *Traité de la Personalité, &c.* vol. i. p. 62. Christophe de Conti, June 21st, 1668. Guessière, *Journal des Audiences*, tom. 2. c. 7. Bruce, April 15. 1790. (Bell's *Cons.*, 519.) Douglas, February 7. 1792 (2928.), and March 18. 1796, in D. P. Ommaney, March 18, 1796, D. P. Hog, June 7. 1791. (8193. Bell, 491. aff. D. P., May 7. 1791.) *Bempde v. Johnson*, 3 Ves. 198. *Somerville v. Somerville*, 5 Ves. 758. Strothers, July 1. 1803. (No. 4. Ap. For. Comp.) *Selkrig v. Davies*, 2 Dow. 230. *Pedie v. Grant*, D. P., July 5. 1825. *Morecombe v. M'Lellan*, June 27. 1801. (F. C.) *Shedden v. Patrick*, July 1. 1803. (No. 6. App. Foreign) Aff. D. P., March 2. 1808. *Strathmore Peerage Case*, D. P. July, 1821.

For the Respondent, — Pothier, vol. iii. p. 320. Menochius, p. 662. No. 16. Schurff, *Cent.* 2. 56. No. 4. *Code Napoleon*, Mot. vol. iii. p. 15, 16. 61. Perezius, *Lib.* 5. Tit. 27. Huber *de Conflictu Legum*, § 9. 12. 13. 15. *Dict. des Arrêts*, vol. i. p. 777. vol. ii. p. 546. 2 Craig. 13. 16. 1 Ersk. *Inst.* 6. 52. 1 Bank. 5. 54. Hertius *de Collisione Legum* § 4. 10. 16.

Cited in the judgment. *Case of Lolley, Russ. & R.*, Cro. Cas. 237.

*Earl of Eldon.* — My Lords, the cause which stands next for judgment is that which has been called the legitimation cause. It is not my intention to trouble your Lordships with more than a very few words upon that case. It is merely to state, that the points which have been raised in the discussion of this case have not escaped my attention, and that I do not give an opinion upon it without materially considering the cases which have been previously decided. I have looked though all the judgments in the Consistorial Court, and the judgment of the learned Judges in the Court of Session, in order to correct the opinion I had formed upon those former cases, and which I had thought it right and consistent with my duty to express. I have listened with the utmost attention; also, to that which was stated at your Lordships' bar; and the result I have come to is, that it is not possible for me to find that that individual was legitimate. If I am right in that, the judgment must be reversed.

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*The Lord Chancellor.* — My Lords, in this case, I will state to your Lordships, in a word, what are the facts of the case. A person of the name of Ross, who was a Scotchman by birth, came to England in early life, and resided in England, where he carried on business for fifty years, domiciled in London where that business was carried on. He formed a connection, I think, about the year 1811, with a woman, with whom he cohabited. By that woman he had a child. Five years afterwards, while he was still domiciled in London, he went to Scotland with the child and with the woman, for the purpose of being married. He did

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not go to Scotland for the purpose of remaining in Scotland, but went obviously *animo revertendi*. He was married in Scotland; remained in that country a few weeks; returned to London to his former domicile; remained there during the continuance of his life, and died in London.

The question is, whether, by the law of Scotland, the child has become legitimate by the marriage of its parents under the circumstances which I have stated. In the argument at the bar a principle was stated, (upon which, however, I should be unwilling to decide this case,) that, by the law of Scotland, where persons cohabit together, unmarried, and a child is born, and they afterwards marry, with certain exceptions it is implied that a contract of marriage was formed previous to the conception of the child. On the other hand, it was contended at the bar, as it had been contended in the Court below, that the principle did not apply to a case of this description, for that no such contract could constitute a marriage in this country: that nothing could constitute a marriage in England except the ceremony of marriage *in facie ecclesiæ*; and that, therefore, if such be the principle of legitimation *per subsequens matrimonium* relied upon, the individual cannot be legitimate in this case. Attending to the whole of the argument, I consider the law of Scotland in this respect fit matter for consideration in other cases; but I do not wish to dispose of this case upon that principle.

This brings me then to the cases to which my noble and learned friend has alluded. The case of *Shedden v. Patrick*, with the exception of the difference of country, was similar to the present. A native of Scotland went to America, where he was

domiciled: he lived there for more than twenty years: he lived with a woman, by whom he had a child; and he afterwards married her in America: his father had a landed estate in Scotland; and the child born previously to the ceremony of marriage claimed as his heir. When that case came before the Court of Session in Scotland, it was considered by the learned Judges in that Court as necessary, in the first instance, to determine, as a distinct question, the question of legitimacy and the question of *status*. My noble and learned friend has had the kindness to hand me a manuscript copy of the opinions of the Judges of that Court at the time when that case was decided. The fifteen Judges of the Court were unanimous in their judgment, with the exception of only one, who expresses his dissent, however, with great doubt, and great diffidence; and they decided in that case in the manner I have stated distinctly and clearly against the legitimacy. Now, referring to the judgment of some of those learned Judges, I should infer that they came to this conclusion upon the ground which I am about to state; that, by the law of the country where the child was born, it was not only illegitimate, as is found, but that by the law of that country the illegitimacy was indelible, and, therefore, a subsequent marriage could not have the effect of rendering the child legitimate. A distinction might possibly be made between a marriage in Scotland and a marriage in America; but I do not enter into that distinction, for this reason,—that if a marriage be celebrated according to the law and usage of the country in which it takes place, and according to that it is complete, it is complete every where: therefore,

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I do not see, very distinctly, why marriage in Scotland should have a greater effect than would be attributable to a marriage in America, with respect to a child who had been previously born. It appears to me, therefore, unnecessary to go into that point: it is sufficient that the child, being born in a country where the illegitimacy is indelible, that in any country whatever would have the effect of rendering that child illegitimate. I collect that opinion to have been expressed by some of the learned Judges in the case of *Shedden v. Patrick*.

I collect this also from the judgment of Lord Redesdale, in the case of the Strathmore peerage, where the noble and learned Lord commented upon the case of *Shedden v. Patrick*; and I believe that at the time when *Shedden v. Patrick* was decided in this House, that noble and learned Lord was a member of it. In the Strathmore case these are the observations the noble and learned Lord makes — “ I do not enter into the question “ whether, if this marriage had been celebrated in “ Scotland, it might have had the effect of legitim- “ ating the child; because I think it is not neces- “ sary.” (I agree with the noble and learned Lord; I do not think it necessary;) “ but, I must say, that “ I cannot conceive how it could have that effect.” The opinion of that noble and learned Lord is quite obvious from what I have stated, and a subsequent passage, in which he considered the position of the child at the time of its birth, and the character stamped upon it at the time of its birth, as deciding the case. He afterwards says, “ So I apprehend “ that this child was born illegitimate according to “ the law of the country in which he was born, ac-

“ cording to the condition of his mother of whom  
 “ he was born, and according to the state of his  
 “ father, who was, at the time, a person unques-  
 “ tionably domiciled in England.” Taking the  
 whole of the judgment of the noble Lord together,  
 I should conclude that he was of opinion, that if the  
 child was illegitimate at the time of his birth, and  
 according to the law of the country where he was  
 born, that character was stamped upon it indelibly;  
 and that no subsequent marriage could render  
 him legitimate. But it is not necessary to decide  
 that question, for this reason ; — these parties were  
 domiciled in England ; the child was born in  
 England ; the marriage did not take place, indeed,  
 in England, but the parties went to Scotland, for  
 the purpose, expressly, of being married ; and,  
 having been married, they returned to England,  
 to the place of their former domicile. I wish,  
 agreeably to that which has been stated by my  
 noble and learned friend, that this case should  
 be decided with reference to this state of facts,  
 without entering upon those other questions which  
 the case may raise. I am of opinion, upon that  
 ground, that the judgment of the Court below  
 should be reversed.

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*The Earl of Eldon.* — My Lords, the learned  
 Lord's conclusion appears to me to be perfectly  
 correct, that it is your Lordships' duty to reverse  
 this judgment. Under the circumstances of this  
 case, I will just take this opportunity of saying,  
 that I have given the greatest consideration to  
 that which has been expressed in the judgments  
 of your Lordships' House, to the argument at the  
 bar of the House by the counsel, and to the de-

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cisions in Scotland \* with respect to matters of divorce ; with reference to which I shall say no more at present than this ; — that I pledge myself to give the best assistance in my power to your Lordships, if I live till the next session of parliament, in endeavouring to settle what the law is upon that subject. Your Lordships know the judges of the Consistorial Courts have differed from the Court of Session with respect to this very important point. It will be in the recollection of some of your Lordships, that, some few years ago, a person who was divorced in one of the courts in Scotland formed the opinion that he might marry again. He did marry again : he had been originally married in England. He was convicted of bigamy, and the twelve Judges assembled to consider the effect of his conviction, which was a conviction on the northern circuit.† The twelve Judges found, that the marriage having occurred in England, the divorce *a vinculo matrimonii* could not take place but by an English act of parliament. Whether that is right or wrong I will not stop to discuss ; but I must say, that the subjects of England and Scotland should not be left in such a state of the law, subject to such a difference of opinion between the Judges in England and the Judges in Scotland. The mention of the case brings to my mind, that, holding the Great Seal at the time, it did appear to me to be a case in which some degree of mercy, on account of those decisions in Scotland, ought to be extended to that individual ; and it was so extended : but I must take the

\* *Lolley's case*, Russ. & Ryan. 238.

† See *Tovey v. Lindsey*, 1 Dow. 108. and MS. notes, D. P. 1813. *meo labore coll. sed sine fructu*.

liberty of saying, that the law of Scotland and the law of England ought not to remain as they now are on such a question; and I will myself, if no other noble lord undertakes it, introduce into your Lordships' House some measure for the purpose of disincumbering the subjects of both parts of the kingdom of contradictions in law, which are so extremely inconvenient as these are; and I should hope your Lordships would feel the matter to be extremely worthy of your attention.

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*Lord Wynford.* — My Lords, with respect to the case to which my noble and learned friend refers, it was as much considered as any case which ever came under the consideration of the learned Judges. It was argued by some of the most able men at the bar, but the Judges were so clear in their opinion of the law, that they ordered the man to be transported. Mercy was shewn to that man afterwards, on the grounds to which reference has been made, and never in a more proper case. But the Judges considered that at the time of the second marriage the first marriage was subsisting, and had never been dissolved.

In respect to the present case, I will merely say, that I entirely concur in every reason which has fallen from my noble and learned friends. This is a case depending entirely on the character of the party; the character of the party is a principle referable to the law of the country to which the individual belongs, and bastardy is in this country of an indelible character. I have referred to foreign writers upon this subject, particularly the Dutch writers of the greatest authority, and I find that the principle, as laid down by them, is in accordance with those laid down by our own

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writers ; and there is a case in which the point has been decided.

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*The Lord Chancellor.*—My Lords, I find, in confirmation of the principle I have just alluded to, the very case my noble and learned friend has mentioned ; the case of De Conti, decided in France in the year 1668. That was the converse of this principle. That case establishes that, where a child is born in a country where he would become legitimate by a subsequent marriage, he becomes so although the marriage has taken place in a country in which a different law prevails, and where a subsequent marriage would not have the effect of rendering him legitimate. That child was born in France, where the law of subsequent legitimation has effect : the parents afterwards came over to England, and were married in England. There the French court decided, that the effect of the marriage in England, although that law does not prevail in England, was to render the child legitimate in France, which is a complete confirmation of the principle.

I take this occasion of saying, and I am happy to have the occasion of saying, that I have read through from beginning to end the opinions of the Judges in the Commissary Court ; and I think it my duty to say, especially after what has passed within the last few days, that those judgments display so much industry, so much intelligence, and so much knowledge of the subject of that law over which they preside, as to do those learned Judges very great credit ; and to shew that they are persons of considerable knowledge, and abundantly qualified to discharge the duties of the situation which they hold.

*The Earl of Eldon.* — My Lords, in cases of this sort, it is of importance, in appreciating the weight that belongs to the opinions of learned persons, to consider what is the question to which it is to apply itself. I take upon myself to assure your Lordships, that my Lord Redesdale would have discussed the question which the noble and learned Lord has adverted to, and would have had no difficulty in expressing his very decided opinion upon the other branches of the subject, if he had felt that that opinion was called for, in order to decide the particular question raised in that case.

Judgment reversed.

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The following case will be acceptable to the profession, although it has not been finally adjudged. Short notes of other cases upon the subject of legitimation are subjoined.

DOX on the demise of BIRTWHISTLE - - Appellant,  
VARDILL - - - - Respondent.

. D. P. 10th June, 1830.

The question in this case arose in ejectment at the suit of Birtwhistle, in which, by special verdict, the following facts were found: — That William Birtwhistle, in 1819, died seised of the premises in dispute: that all his brothers died in his lifetime, unmarried and without issue, except Alexander, who cohabited with Mary Purdie, a person domiciled in Scotland, and upon her begot John Birtwhistle (the lessor of the plaintiff), who was the only son of J. Birtwhistle and Mary Purdie, who, after his birth, were married in Scotland, and according to the laws of Scotland: that Alexander died seised of lands in Scotland, to which John was served heir, according to the law of Scotland:

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and that, according to that law, a child born before the marriage of the parents is legitimate.

Upon argument of this case in the King's Bench,\* judgment was given for the Defendant; and upon writ of error, the case having been argued in the House of Lords, before the Judges, to whom questions were proposed, the following opinion was delivered by Sir William Alexander, the Lord Chief Baron of the Court of Exchequer:—

The principal authorities cited in argument for the Plaintiff were, Ersk. Inst. B. 1. tit. 6. § 32. *Dalrymple v. Dalrymple*, 2 Hagg. Cons. Ca. 54.: *Shedden v. Patrick*, D. P., 3d of March, 1808: *The Earl of Strathmore's Case*, D. P. 1821: *Gordon v. Gordon*, 3 Sw. 400.: and see the authorities cited in arg. 8 Dowl. & Ry. 186. *et seq.*

*The Lord Chief Baron.*—My Lords, in this case the Judges have agreed upon the answer which is to be given to the question put to them by your Lordships. The question is this:—  
“A. went from England to Scotland, and resided and was domiciled there, and so continued for many years, till the time of his death. A. cohabited with M., an unmarried woman, during the whole period of his residence in Scotland, and had by her a son, B., who was born in Scotland. Several years after the birth of B., who was the only son, A. and M. were married in Scotland, according to the laws of that country. By the laws of Scotland, if the marriage of the mother of a child with the father of such child takes place in Scotland, such child, born in Scotland before the marriage, is equally legitimate with children born after the marriage, for the purpose of taking land and for every other purpose. A. died seised of real estate in England, and intestate: is B. entitled to such property as the heir of A.?”

It appears to us, that whenever a question of the nature put to us by your Lordships arises in an English court of justice, there are two points to which the attention of the Judge must be directed, separately, and in succession to each other. The first in order regards the *status* or condition of the claimant. The second is, what rules of inheritance the law of the country where the property is situated and the tribunal sits has impressed upon the land, the subject of the claim?

As to the first of these questions, I believe I express the opinion of the Judges, when I say, in the well considered lan-

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\* 8 Dowl. & Ry. 185. The case in D. P. was argued for the Appellant by Mr. (now Lord) Brougham and Dr. Lushington.

guage of Lord Stowell, in the case of *Dalrymple v. Dalrymple*, "The cause being entertained in an English court, must be adjudicated according to the principles of the English law applicable to such a case; but the only principle applicable to such a case by the law of England, is, that the *status* or condition of the claimant must be tried by reference to the law of the country where the *status* originated: having furnished this principle, the law of England withdraws altogether, and leaves the question of *status* in the case put to the law of Scotland." Such is the sentiment of that great Judge, and such is his language, varied only so far as to apply to a question of legitimacy what was said of a question respecting the validity of marriage.

When the question of personal status has been settled upon these principles, when it has been ascertained what the claimant's character and situation are, it becomes then necessary to enquire what are the rules and maxims of inheritance which the law of that country where the inheritance is placed, and whose tribunals are to decide upon it, has stamped and impressed upon the land in debate.

In order the more distinctly to explain what is meant, I will suppose a case in many circumstances resembling the present. In addition to the circumstances stated in the question, let it be further supposed that the father and mother of the claimant had, after their marriage, one or more sons born to them. Suppose then the present claim to be made. The first enquiry having been satisfied, and it being upon that enquiry perfectly ascertained that the claimant is the eldest legitimate son of his deceased parent for the purpose of taking land, and for every other purpose, by the law of Scotland, it will next be requisite to enquire what are the rules and maxims of inheritance which the law of England has impressed upon that land which is the subject of the claim. Let it further be supposed, that upon this enquiry it shall turn out that the land claimed is of that description which is called Borough English. This being proved, we think it clear that the claimant's legitimacy by the law of Scotland, his right to inherit by that law, will give the claimant no right whatever to the land in England held in Borough English.

The comity between nations is conclusive to give to the claimant the character of the eldest legitimate son of his father, and to give him all the rights which are necessarily consequent upon that character: but what these rights are respecting English land must be left to the law of England, and the comity is totally ineffectual to alter, in the slightest degree, the rules of

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inheritance and descent which the law of England has attached to this English land. It would, unquestionably, descend upon the youngest son. I am anxious to mark clearly the distinction which I have pointed out, because it is upon that distinction that our opinion turns. I will, therefore, illustrate it by another example.

Take the case of *Ilderton v. Ilderton* (2 H. Blac. 145.): that is the case of a claim to dower by a foreign widow: whether she is a widow or not, that is, whether she was the lawful wife of the man who was, during the coverture, seised of the land, is a question which the law of England permits, upon a claim to English land, to be determined by the foreign law, the law of the country where the contract of marriage was made: there the comity stops. When her character of widow shall have been fixed according to these foreign rules, the law of England comes into action, and, proceeding inexorably by its own provisions and regulations, decides what are the interests in the English land which her character of widow has conferred upon her. It enquires what are the rules which attach upon the particular land in favour of a widow. If, upon that enquiry, it appears that the land is subject to the common law, it will give her a third; if it appears to be gavelkind, one half, while she remains *casta et sola*. If the land be customary land of any manor, the custom must be looked into; and she can have only what that custom shall bestow, however strange and capricious that custom may be.

The distinction to which I am directing your Lordships' attention is very familiar to foreign jurists, and is noticed by them as the difference between real and personal *status*: the last being those which respect the person, and follow it every where; the first being those which are connected with the land, and adhere to it, and are as immovable as the subject to which they are applied.

My Lords, it appears to us, that the answer to the question which your Lordships have put must be founded upon this distinction; — while we assume that B. is the eldest legitimate son of his father, in England as well as in Scotland, we think that we have also to consider whether that status, that character, entitles him to the land in dispute as the heir of that father; and we think that this question, inasmuch as it regards real property situated in England, must be decided according to those rules which govern the descent of real property in that country, without the least regard to the rules which govern the descent of real property in Scotland.

We have therefore considered, whether, by the law of England, a man is the heir of English land, merely because he is the eldest legitimate son of his father. We are of opinion that these circumstances are not sufficient of themselves, but that we must look further, and ascertain whether he was born within the state of lawful matrimony; because, by the law of England, that circumstance is essential to heirship; and that this is a rule not of a personal nature, but of that class which, if I may use the expression, is sown in the land, springs out of it, and cannot, according to the law of England, be abrogated or destroyed by any foreign rule or law whatsoever. It is this circumstance, which, in my judgment, dictates the answer we must give to your Lordships' question, viz. that in selecting the heir for English inheritance, we must enquire only who is that heir by the local law. It has appeared to us that the vice of the Appellant's argument consists in treating the question of who shall be heir to English land as a question of personal *status*. So it is, no doubt, up to a certain point, but beyond that point it becomes a question to be decided entirely by the local rules relating to real property in the realm of England.

That the rule of the English law is what I have represented, can hardly require proof. If the argument from the comity of nations be shaken off, no man will doubt that a person legitimated *per subsequens matrimonium* is not the heir of English land. What my Lord Coke says, in page 7. of the first Institute, affords the rule: — "*Hæres*, in the legal understanding of the common law, implyeth that he is *ex justis nuptiis procreatus*," for *Hæres legitimus est quem nuptiæ demonstrant*." Perhaps my Lord Coke's expression would have been more precise and accurate, if, instead of saying "*ex justis nuptiis procreatus*," he had said "*ex justis nuptiis natus*." But this is what is meant, as all experience shews. It would be useless to follow this further, but it will be material to recollect, that this maxim, which pervades all our books, and which is confirmed by all our practice, though it is, in form, a description of the person who shall be heir, is, in substance, in our opinion, a maxim regarding the land, describes one of its most important qualities, traces out the course in which it shall descend, and is no more liable to be broken in upon by any foreign constitution than are the degree of interest which the heir shall take in the land, the conditions on which he shall hold it, the proportion which a woman shall obtain as a widow, or the limitations and conditions attached to her estate.

I have endeavoured to state the principles and to shew the

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 HATFIELD.

course of reasoning which has conducted my learned brothers and myself to the conclusion, that B., the person designated by your Lordships, is not entitled to the property in question as the heir of A. Before I finish I will notice two arguments used on behalf of the Appellant, which merit particular attention.

It is said for the Appellant, that, according to the rule we adopt, if he is born in lawful wedlock, he fulfils every condition required of him; now they say he is born in lawful wedlock, because, by a presumption of the Scottish law, a presumption *juris et de jure*, there was a marriage anterior to his procreation. It is by force of this presumption that he is legitimate: by this fiction he is born within the pale of lawful matrimony. We know that this fiction is, by many respectable writers on the Scottish law, represented as accompanying the legitimation *per subsequens matrimonium*. But we do not concede the consequence deduced from it as applicable to the present question. The question is, what the law of England requires, and, as we are advised, the law of England requires that the claimant should *actually*, and, *in fact*, be born within the pale of lawful matrimony, we cannot agree that the presumption of a foreign jurisprudence, contrary to the acknowledged fact, should abrogate the law of England, and that by such a fiction a principle should be introduced, which, upon a great and memorable occasion, the legislature of the kingdom distinctly rejected: your Lordships will perceive that I allude to the statute of Merton. It would seem strange to introduce indirectly, and from comity to a foreign nation, a rule of inheritance which may affect every honour and all the real property of the realm; which rule, when proposed directly and positively to the legislature, they directly and positively negated and refused; a refusal that, in England, has obtained the approbation of every succeeding age.

Again, my Lords, it is said that two cases have been decided in this House which are nearly in point, and will prove that the claim of B. should be supported. These cases are the cases of *Shedden v. Patrick*, and the case of Lord Strathmore. These two cases are alike in principle, and establish the same proposition. In the one case the parents lived in a state of concubinage in America, and in the other in England. In both children were born to them. Afterwards, the parties married in their respective countries; by force of their marriages the American issue claimed Scottish land, and the English issue claimed Scottish honours: in both your Lordships decided

against the claimants. Now, it is said, these authorities are exactly the converse of the present case. They establish the principle, that the courts of the country where the lands lie, in a question respecting the heirship to these lands or honours, inform themselves whether the claimant is heir, not by the law of the country where the lands lie, but in the country, of the domicile, where the marriage of the parents was contracted; and if he is not heir by that foreign law, his claim is rejected: from which they deduce this consequence, that if he is heir, his claim should be sustained.

This argument presents itself in a very plausible shape, and was pressed at the bar, as it seemed to me, with striking ingenuity and force. But if I have had the good fortune sufficiently to explain the principles which have conducted my learned brothers and myself to the opinion I have stated, you will soon perceive that these principles afford a conclusive answer to it. The first step to be taken in every case of this kind, as I have already explained, is to enquire into the *status* of the claimant. The *status*, it is argued, is to be determined by the law of the foreign country; with this the *lex rei sitæ* does not intermeddle, and intermeddles no more when that foreign law establishes the claimant's bastardy than when it proves his legitimacy. In both the cases the claimants were bastards; the laws of their own country, the laws of their domicile, the laws of the spot where the matrimonial contract was entered into, declared them to be illegitimate: the law which, by the acknowledged principles, ascertained their personal *status*, fixed upon these persons a character of illegitimacy fatal to their claims: on the first step the ground sunk under them, and it became impossible for them to advance.

It is obvious, that if in the cases to which I am now referring, the claimants had been declared heirs by the Scottish law, the Scottish law admitting of no heirship without legitimacy, must have been called in aid to bestow upon them that personal character of legitimacy refused to them by their own law; in other words, a law foreign to their birth, to their domicile, and to the marriage of their parents would have been held to bestow upon them their personal status and character,—a decision certainly contrary to the acknowledged principles upon this subject. The character of illegitimacy attached to the persons of the English and American claimants by their own law, accompanied them every where, and would prevent their being received as heirs any where within the limits of the Christian world. This view, in our judgment, renders these decisions

1832.

DOX  
V.  
METHWISTLE.

1832.

DOE

v.

BENTWELL.

entirely consistent with the principles I have unfolded, and prevents our considering them as objections to the opinion I entertain, that B. is not entitled to the property in question as the heir of A.

My Lords, it is matter of satisfaction to us to reflect that this rule, held by us to be the rule of the English law, is more useful and convenient than the rule opposed to it contended for by the Appellant. Convenience and utility, when it regards so important a subject as inheritance, appears to me to be of the highest consequence in the administration of justice. The rule I have stated, which limits the operation of the foreign law to fixing the personal *status*, and excludes it from any ulterior influence in regulating the succession to real property, has a manifest tendency to render the law of inheritance simple and uniform, by preserving it unaltered and unchanged, and by sending us to look for it among our own municipal institutions alone, and among the decisions of our predecessors applicable to such questions.

It will exclude many difficult and intricate enquiries which might intrude themselves from foreign laws into this subject. Some of these were suggested at the bar in the argument for the Respondent; and there would be many others, whose details no human foresight can anticipate, although the various transactions of mankind, and the variety in the laws of foreign nations would assuredly bring them upon us.

My Lords, I conclude that it is the humble opinion of all the Judges who have attended the argument of this case, that B., described in your Lordship's question, is *not* entitled to the property in England as the heir of A.

## PATRICK v. SHEDDEN.

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D. P. 1808.

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1832.

  
 PATRICK  
 v.  
 SHEDDEN.

Shedden, a Scotchman by birth, went and settled in America, and was domiciled in the United States after the establishment of their independence. He cohabited with a woman, who had a child born in that country, and who was reputed and brought up as his son. After the birth of the child, the parents were married in the United States, according to the forms of the law in that country. It was held, on appeal to the House of Lords from a judgment of the Court of Session in Scotland, that the son was not legitimate for the purpose of inheriting lands in Scotland.

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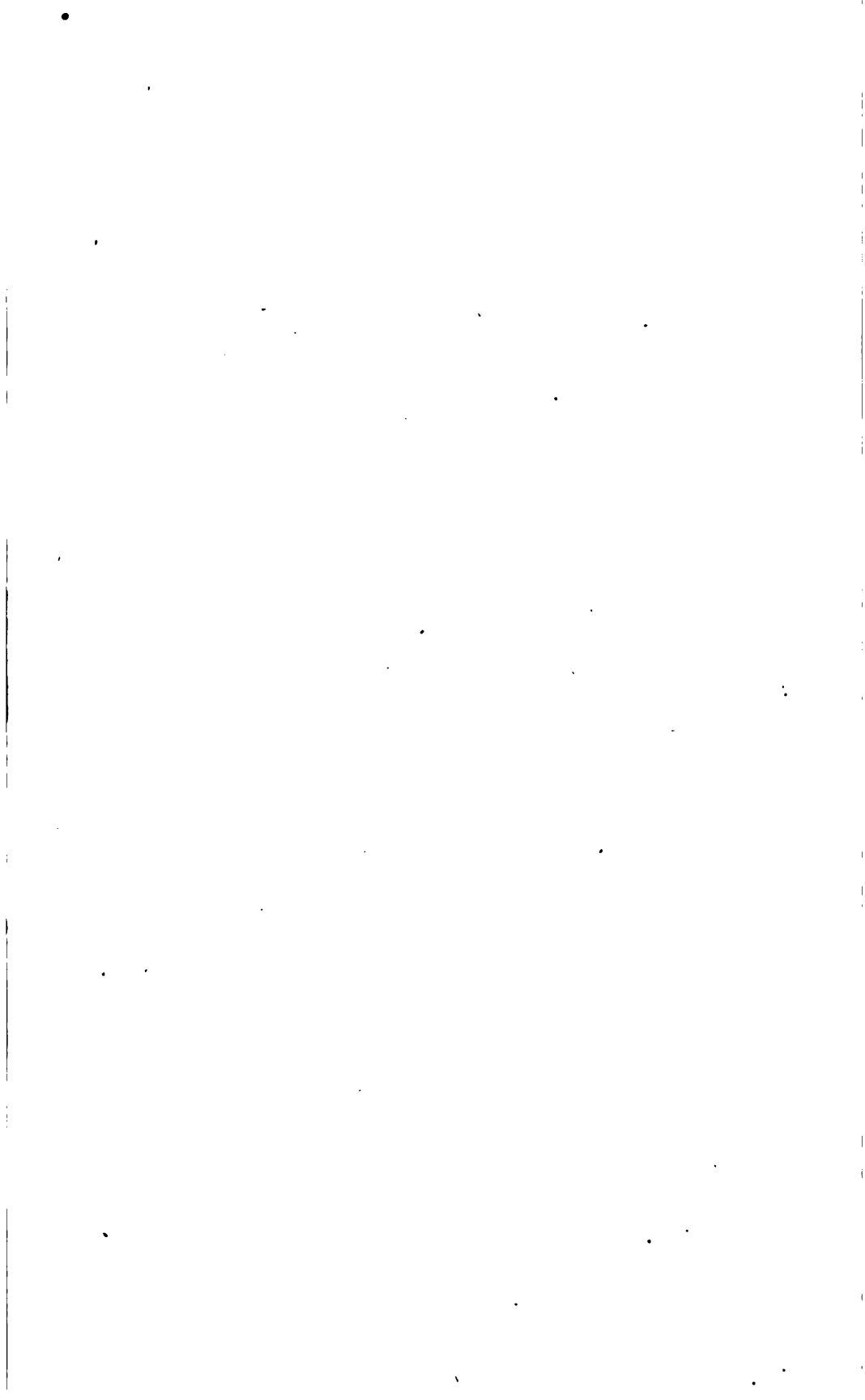
## STRATHMORE PEERAGE CASE.

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D. P. 1821.

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The late Earl of Strathmore was of Scotch origin, a Peer of Scotland, and held lands and hereditary offices in Scotland, which required his occasional presence and abode in Scotland; but his general domicile was in England. For some time before the year 1820 he cohabited with M., an English woman, who, during the cohabitation, had a child, who was reputed and treated by the Earl of Strathmore, and brought up by him, as his son. On the day before his death the Earl of Strathmore, being then in his last illness, and supported at the altar, was married to M., in the parish church of St. George's, Hanover Square. It was held in a committee of privileges that the son was not legitimate for the purpose of inheriting a Scotch peerage.



# I N D E X.

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**ACTION UPON THE CASE.** *See SHIP.*

**AGENT.** *See ISSUE.*

**AMENDMENT.** *See PRACTICE.*

**APPEAL.** *See PRACTICE.*

**ATTORNEY AND CLIENT.** *See ISSUE.*

**ASSETS, ADMINISTRATION OF.** *See EVIDENCE.*

**BANKRUPT.**

A. contracted a debt before he was a trader, which continued unpaid during his trading, and until after it ceased. Held, that this debt was sufficient to support a sequestration (*or fiat*) upon an act of bankruptcy committed after the trading had ceased.—*Grant v. Baillie.*

Page 463.

**BOND.** *See EVIDENCE. PLEADING.*

**CHARTER PARTY.** *See SHIPPING.*

**CONDITION.** *See PLEADING.*

**CONSIDERATION.** *See EVIDENCE. PLEADING.*

**CONSTRUCTION.** *See DEVISE.*

**COSTS.** *See PRACTICE.*

**CRÉDITOR.** *See EVIDENCE.*

**DEVISE.**

J. H., by his will, devised a copyhold mansion house and pleasure grounds, &c. at P., where he resided, to trustees, in trust for his wife, during her life or widowhood, and upon her decease or second marriage, &c. upon such trusts, &c. as should best correspond with the uses, &c. thereafter declared, concerning the residue of his real estates, &c.: and he thereby bequeathed to his wife his plate, furniture, &c. The residue of his real estate he gave in trust for his son, and the issue of his son, in the usual course of settlement; and he thereby charged upon the residue a rent or annuity of 300*l.* a year for his wife, during her life, with a contingent increase of 100*l.* per annum in case of the failure of the issue of his son. By a first codicil, which was made after the death of the son without issue, he revoked the bequest of the plate, furniture, &c., and in place thereof bequeathed to his wife, for her own use, all his farming stock, house-



hold goods, and all other his effects in and about his residence at P., and he thereby also gave to his wife absolutely an additional annuity of 100*l.* per annum, and he bequeathed to her the residue of his personal estate for her own use. By a second codicil he made her sole executrix and residuary legatee. By a third codicil he gave to his wife the proceeds and profits of five shares which he held in the County Fire Office, for her life. On the 14th September, 1822, the testator made a fourth codicil to his will, as follows: "I do make and add this further codicil to my will, hereby revoking and making null and void several of the dispositions heretofore made by me, in my said will and codicils, of my freehold, copyhold, and personal estate and effects, of all and every kind and description, and instead and in the place of such devise, disposition, and bequest thereof, I do give, devise, and bequeath all and every my freehold, copyhold, and personal estate and effects, of every kind and description whatsoever and wheresoever situated, unto my daughter, Anna Maria Hearle; and from and after the determination of that estate, I give, devise, and bequeath the same unto my grandson, John Graves, and his heirs in strict entail, as in my said will directed, with this additional clause, especial and positive orders, that in case the said John Graves should not be 31 years of age at the time my said estates shall devolve on him, by the death of my daughter, that he shall not take, or be put in possession of the same, until he shall have attained such age of 31 years, but that the rents and profits thereof shall accumulate and be in the hands of my trustees, for the use and benefit of my said grandson and his heirs; and in failure of issue of the said John Graves, I order that my said estates and effects shall go and descend as is by my said will directed; and I do hereby ratify and confirm the several annuities and donations by me in my said will, and former codicils, given and bequeathed; and I do further give and bequeath unto my dear wife Jemima one other annuity of 100*l.*, to be paid to her in like manner, and with the like restrictions, as the former ones given her by my will and codicils; hereby in all other respects but what is above mentioned, confirming my said will and codicils."

By a fifth codicil, dated on the 3d of July 1823, he gave to his wife, and at her disposal, all sums of money which

she or the testator might be entitled to out of the effects of her late father, or that any other friend might leave her, and ordered his executors, in case she should die before him, to fulfil her will and disposal thereof. The testator died in 1825.

Held, upon ejectment and special verdict, that the clause of revocation contained in the fourth codicil, did not apply to the devise to the wife of the copyhold and premises at P. with such clearness and certainty, as to operate as a revocation of the explicit devise of these premises contained in the will. — *Hearle v. Hicks.* p. 37

EQUITY. See EVIDENCE. POWER. REGISTRY.

ERROR. See PRACTICE.

EVIDENCE.

Under a decree for the administration of assets, N., a creditor, brought in before the Master a claim upon a bond of E. K., the testatrix, and M. K., her sister, for 12,000*l.*, whereupon, at the instance of the parties in the suit, it was directed that N. should be examined upon interrogatories, &c. Upon his examination he deposed that the bond was given partly for money lent, and partly for services, but was unable to state the proportions. It appeared also that he had received monies on account of E. K. and M. K., and that he had taken memorandums for some of his payments, but had no vouchers for the payments: that no accounts were kept, and no settlement took place before the execution of the bond, at which time the vouchers were destroyed.

The Master, by his report, certified that N. was the confidential friend and adviser of E. K. for many years before her death, and was in the habit of raising money for her use, by procuring loans from C. and Co., who were her bankers, and joined with E. K. and her sister M. K. in securities to C. and Co.; that in 1813, 2000*l.* was borrowed of C. and Co. by E. K., and that N. joined in a bond to secure the repayment; that on the 15th day of July 1815, E. K. and M. K., by the agency of N., borrowed 10,000*l.* of C. and Co., the repayment of which was secured by the joint bond of N., as surety with E. K. and M. K.; that the bond for 12,000*l.* was executed on the same day; that the solicitors of E. K. and M. K. were not consulted, nor any professional person present when the bond was executed; and that it had been submitted to him under these circumstances, and

from the evidence of letters produced, that the bond for 12,000*l.* was an indemnity or counter security.

The Master also found and certified that E. K. by her will bequeathed to N. a sum of 2000*l.* for his services; and upon consideration of the examination, the letters, &c. he certified his opinion that the bond was not a bond of indemnity, but a voluntary bond given to N. as a bounty by E. K. and M. K., without any consideration having been paid or given for the same. The Plaintiffs in the cause excepted to the report, on the ground that it ought to have been certified that the bond was given as an indemnity. N. also excepted to it, upon the ground that it ought to have certified that the bond was given partly for services and partly for money lent.

N. died in 1828, leaving the appellant his personal representative.

The cause was heard in 1829 before the Master of the Rolls upon the exceptions, &c., when issues were directed, 1. whether the bond or as to any and what part thereof was for services performed by N., &c. or as to any and what part for money lent by N., &c.; 2. whether it was executed as a bond of indemnity to N. in respect of the bond of 10,000*l.* to C. and Co. in which N. was a co-obligor, or in respect of any other engagement into which N. had entered as a security for E. K. and M. K. 3. whether it was intended as a gift, &c. Upon appeal against the order directing these issues, it was held in D. P. that issues ought not to have been directed, but that the court below ought to have decided upon the evidence in the cause, whether it was a bond of indemnity, or for consideration, or gratuitous, or otherwise.

In pursuance of this judgment, the case having been brought before the Master of the Rolls, it was by his order declared that the bond as to 10,000*l.* was a counter security, and as to 2000*l.* was a gift. Upon appeal against this order, it was reversed so far as regarded the declaration that the bond as to 10,000*l.* was a counter security, the House being of opinion that the burden of proof as to this fact was upon those who desired to set aside the bond. — *Nicol v. Vaughan* p. 104

**EXECUTION.** See **POWER**. **PREROGATIVE**.

**EXTENT.** See **PREROGATIVE**.

**FRAUD.** See **ISSUE**. **TRUST**.

**HEIR.**

1. A native of Scotland in early life settled in England, but

made occasional visits to his friends, and to manage estates which he had in Scotland. He cohabited in England with an English woman, and of her a child was born in England, who was reputed his son. He afterwards went to Scotland, and after a residence of fifteen days married the mother of the child, remained with her in Scotland about two months, and then returned with the mother and child to England, where they remained until his death: Held, that the child was not heir to the reputed father, to inherit lands in Scotland. — *Munro v. Saunders* - - - - - Page 468

2. A. B., a man domiciled in Scotland, cohabited with M. P., also domiciled there, and upon her begot J. B., who was the only son of A. B. and M. P., and was born in Scotland in 1799. In 1805 A. B. intermarried with M. P. according to the law of Scotland; A. B. died in Scotland in 1810, seised of lands of inheritance, to which J. B. was served heir; and J. B. from his birth remained domiciled in Scotland; Held, by the twelve judges, that J. B. was not legitimate for the purpose of inheriting land in England. — *D. Birtwhistle v. Vardill* 479
3. A., by birth a Scotchman, being domiciled in the United States of America after the establishment of independence, cohabited with a woman, by whom he had a son; after whose birth the parents were married in the United States of America, according to the laws of that country. Held, that the son was not legitimate for the purpose of inheriting lands in Scotland. — *Patrick v. Shedden* - - - - - 487
4. S., a Peer of Scotland, of Scotch origin, and holding lands and hereditary offices in Scotland, but born in England; had, by cohabitation with M. a child, who was reputed and treated by him as his son. On the day before his death, being in his last illness, and supported at the altar, he married M. in England, according to the rites of the church of England: Held, that the son was not legitimate for the purpose of inheriting a Scotch peerage. — *Case of the Earl of Strathmore* - - - 487

ILLEGAL CONDITION. See BOND.  
ISSUE.

R. having a lease of lands near London adapted for building, and improving in value, with which advantages he was well acquainted, by residence on the spot, employed T., the confidential solicitor of his landlord, to apply for a new lease. An agreement for a long lease at a

gross undervalue, and upon terms very disadvantageous to the landlord, was obtained by the co-operation of the solicitor, at a time when the landlord, a very old man, was confined to his bed by illness, it being supposed by the solicitor that he was dying.

The agreement, which contained a proviso that T., the solicitor, should be employed in preparing the underleases on the property, was signed on a Saturday. On the following day (Sunday) instructions were sent by the solicitor to a conveyancer to prepare the lease on behalf of the lessee, and many of the covenants usual in such leases were omitted. The lease was prepared and executed on the following Wednesday, the landlord not being duly apprised that his solicitor was thus acting for his tenant.

The proviso in the agreement for the employment of the solicitor in the underleases was not inserted in the lease, but by arrangement between the tenant and the solicitor it was omitted, and as a substitute to secure this advantage a bond for 10,000*l.* was given to the solicitor by the tenant, who also gave him a gratuity of 100*l.* upon the settlement of his bill.

The landlord died some months after signing the agreement and executing the lease, and a party entitled under his will to a life estate in the premises, with a remainder in fee subject to intervening contingent uses, accepted rent from the tenant for some time after the death of the deviser, but in ignorance of the facts as to the procurement of the lease. Having discovered the facts, he filed a bill to set aside the lease, on the ground of fraud and imposition, and by decree in Chancery the lease was set aside as unfairly and improperly obtained.

On appeal, this decree was varied, by directing issues on the following questions: First, Was the lease obtained by fraud and imposition? Secondly, Did B. know when he executed the agreement that T. was the solicitor of R., and acting for him in the matter of the agreement or of the lease, as well as for B.? Thirdly, Was the lease granted at an under-value? Fourthly, Did B. intend to favour the Defendant R. in respect of the terms on which the lease should be granted? Fifthly, Was the lease granted at an under-value, supposing B. intended to favour the Defendant R.? — *Rhodes v. Beauvoir*

Page 195

JUDGMENT. See PRACTICE.

**JURISDICTION.** *See* PRACTICE.

**LEGITIMACY.** *See* HEIR.

**LETTERS PATENT.** *See* PLEADING.

**MARRIAGE SETTLEMENT.** *See* REGISTRY.

**MISTAKE.** *See* POWER.

**PLEADING.**

In the condition of a bond executed to D. for 10,000*l.* an agreement was recited to the following effect:— That S., one of the obligors, had obtained letters patent for the distillation of potatoes; and that S., together with B. and F., the two other obligors, were engaged in partnership in a distillery, according to a system for which the patents were procured; and that they were desirous of selling and transferring their interest in the concern to a company; and that they had agreed with D., who was a man of large acquaintance and influence, that he should procure persons to take 9000 shares of 50*l.* each, into which the concern was to be divided, and to form a joint stock company, under the title of the Patent Distillery Company; and that to induce D. to exert his influence for such purposes, and to indemnify him for his expenses, S., B., and F. had agreed to pay to D. the sum of 10,000*l.* by three instalments, at the times when the calls upon the shares should be paid.

An action of debt being brought by D. upon this bond, F., who was Defendant in the action, pleaded that the letters patent were granted to S. upon the express condition that if S., his executors, administrators, or assigns, or any persons who should have any right, title, or interest, &c. in the invention, should make any transfer or assignment of the liberty and privilege, or any share of the benefit or profit thereof, or should declare any trust thereof to or for any number of persons exceeding five, or should open any books for public subscription, &c., or should act as a corporate body, or should divide the benefit of the letters patent, &c. into any number of shares exceeding five, or should do any act, &c. contrary to the intent, &c. of the statute 6 Geo. 1., or in case the power, privilege, &c. should at any time become vested in, or in trust for more than five persons or their representatives, &c. that the letters patent, &c. should be void; and then it was averred in the plea that the company mentioned in the condition of the bond was intended by the parties thereto, at the time of executing the bond, to consist of more than five persons, to wit, 10,000 persons, and to be formed for the purpose of

using the privileges, &c. in the letters patent mentioned, for the use of such persons exceeding five in number, &c.; and that therefore the letters patent were void.

To these pleas a general demurrer was put in by the Plaintiff.

Upon argument of these demurrers in C. P. judgment was given for the Defendant; and this judgment, upon error in K. B. and D. P., was affirmed, upon the ground of the statement in the plea, that it was intended by the parties to the bond that the company was to consist of more than five persons to receive the benefit of the letters patent, which being a violation of the condition upon which they were granted, no action could be maintained upon the bond.—*Duvergier v. Fellowes* . Page 87

**PRACTICE.** See *ISSUE*.

1. N. having filed in the Court of Exchequer a bill for an account of tithes, which was dismissed with costs, for want of prosecution, was committed to the Fleet prison for contempt, upon disobedience of an order for payment of the costs, and thereupon sequestration issued. By an order, made on the application of the Respondent S. (the Defendant in the suit), stating that the Court had been informed that there was no property of N. which the commissioners could sequester, except certain tithes of which N. was seised, and had demised to G., the Appellant, at a yearly rent, and that the Commissioners had demanded the payment of the costs, &c. from the Appellant, out of the rent in his hands due to N.; it was ordered that the Appellant should shew cause why he should not attorn tenant to the Commissioners, and pay to them out of the rent due the amount of the costs in the suit, and of the sequestration, &c. Upon this order the Appellant appeared, and for cause, among other things, shewed that the tithes did not belong to N., but to one W. Whereupon it was, by a further order of the Court, referred to the Master, to enquire whether, at the time of the service of the order of sequestration upon the Appellant, the tithes in question belonged to N.; and that W. should be at liberty to come in before the Master and be examined, *pro interesse suo*.

Upon appeal against these two orders, no counsel appearing for the Appellant, the House refused to affirm the judgment, unless the case were stated by the counsel for the Respondent, and considered by the House; which not being done, it was directed that the agent for

the Respondent should give in his account of costs, and thereupon an order was made, reciting that, no counsel having appeared for the Appellant, the appeal was dismissed with 100*l.* costs. — *Gardiner v. Simmons* P. 60

2. Upon the trial of an action of assumpsit in the C. P., in Hilary Term 1824, a general verdict was found for the Plaintiff upon all the counts of the declaration. In Easter Term following a rule was obtained by the Defendant, calling upon the Plaintiff to shew cause why the verdict should not be set aside, and a new trial granted, or why judgment should not be arrested. This rule was discharged in Trinity Term 1824, and final judgment signed for the Plaintiff. Upon this judgment a writ of error was brought in the K. B., returnable in Michaelmas Term 1824. The record and process were brought into that court, and in Hilary Term 1825, errors were assigned. At the sittings before Michaelmas Term 1825, the case was argued, and on the 25th of November 1825, the judgment of the C. P. was reversed by the K. B., and a *venire de novo* awarded, upon the ground that there did not appear on the face of the record to be any good or sufficient consideration for the agreement mentioned in the third and fourth counts of the declaration. In the meantime, on the 10th of November 1825, a rule had been obtained by motion on behalf of the Plaintiff in the C. P., to amend the *postea*, by the notes of the judge who tried the cause, by entering a verdict for the Plaintiff on the first count of the declaration, and for the Defendants on the other counts. This rule was made absolute on the 24th of November 1825. On the next day a rule was obtained to amend the judgment roll in the cause, and make it conformable to the *postea*; and this rule was made absolute on the 26th of November 1825; on which same day a rule was obtained by motion in the K. B. to stay the judgment and amend the roll, by the amended judgment of the C. P.; and afterwards the roll was amended accordingly, and the judgment of the C. P., thereupon, affirmed by the K. B.

Upon this affirmance a writ of error was prosecuted in D. P., and the transcript of the record brought into the House contained, by consent of the Judges of the K. B., entries of the orders upon which the amendments had been made, as well as the pleadings and final judgment: Held, that it is contrary to the practice, and not within



the jurisdiction of the House of Lords, or of any court of error, to entertain writs of error upon interlocutory proceedings; and that the consent of the Judges of the inferior Court cannot give such jurisdiction. — *Mellish v. Richardson* - - - - - Page 70

#### POWER.

E., by his will, devised his manors, lands, &c. in trust for his son, C. E., during his life, without impeachment of waste; remainder to trustees, during the life of his son, to preserve, &c.; remainder to the use of the first and other sons of C. E., successively, in tail male; remainder to the second son of the testator, in like manner; remainder to T. E., the daughter of the testator, for life; remainder to her first and other sons, in like manner.

A power was given to the trustees, by the will, with the concurrence of the person in possession, under the limitations, to sell or exchange all or any parts of the manors, lands, tenements, wood grounds, &c. with their appurtenances, &c., and, for that purpose, to revoke the uses, &c. After the death of the testator, and while C. E. was in possession under the limitation, an indenture was executed, to which the widow of the testator, the surviving trustee of his will, C. E., his eldest son, M., a purchaser of White Knights, an estate proposed to be sold, and a trustee for the purchaser, were parties. In this deed, among other things, it was recited, that C. E., the tenant for life, without impeachment of waste, was entitled to the timber and trees standing and growing and being on the premises to be sold; and that C. E. had agreed to sell the said timber and timber trees to the purchaser, at the sum of 2448*l.*; and in pursuance of the agreement it was, among other things, witnessed, that in consideration of 13,000*l.* paid to the trustee, he, in exercise of the power, revoked, &c. and appointed the estate, &c. to the trustee, for the purchaser; and in consideration of 2448*l.*, paid to C. E., he granted and sold to the purchaser and his trustee all the timber and other trees. Previous to this conveyance, a correspondence had taken place between C. E. and the agent for the purchaser, in which it was agreed that the timber should be taken at a fair valuation; but it was not expressly stipulated that C. E. should receive the purchase money.

Upon the death of C. E. an action was brought by the issue in tail under the limitation, to recover possession

of the premises, upon the ground that the appointment under the power was void; and judgment being obtained in the action, a bill was filed by parties interested under the purchase deed, and mortgagees of the premises, &c., and to have the alleged mistake rectified, the deed reformed, according to the contract in the letters, and that the tenant in tail might do all acts necessary to confirm the title. This bill was dismissed for want of equity, and upon appeal the decree was affirmed. — *Cockerell v. Cholmeley* - - - Page 120

PRIORITY. See PREROGATIVE. REGISTRY.

PROOF. See EVIDENCE.

PURCHASE. See TRUST.

PREROGATIVE.

In pursuance of a commission and inquisition thereon, finding G. and P. indebted to the crown, an extent issued on the 21st of August 1816, to the sheriff of, &c. to enquire what debts G. and P. had in his bailiwick. By an inquisition thereupon, taken on the same day, it was found that F. and N. were indebted to G. and P. in 1480*l.* for money lent, which debt the sheriff seized into the King's hands. On the same 21st day of August, a writ of *capias ad satisfaciendum* and extent was issued and delivered to the sheriff, whereby he was directed to enquire what lands, &c., and to appraise, extend, and seize the lands, goods, and chattels of F. and N. into the King's hands, until the debt should be satisfied. Upon an inquisition before the sheriff on the 21st of October 1816, and taken under the before-mentioned writ, it was found that F. and N., on the day of issuing the writ, were possessed, as of their own, &c., of divers goods and chattels within the bailiwick, which were in the sheriff's custody at the time of issuing the writ by virtue of three writs of *feri facias*, for sums amounting together to 3727*l.*, and of an extent tested the 22d of July 1816, for 3066*l.*, and of an extent in aid, tested the 27th of July 1816, for 650*l.* The goods were thereupon seized by the sheriff into the King's hands, subject to the prior executions and extents.

Before the issuing of the extent of the 21st of August, three several writs of *feri facias*, at the suit of several creditors, had issued against F. and N., indorsed respectively for 351*l.*, 376*l.*, and 3000*l.*, under which writs the sheriff, in the month of July 1816, had seized

and taken in execution the same goods and chattels as were seized under the extent of August 1816, of sufficient value to satisfy the several sums indorsed on the three writs of *feri facias*.

All the other writs of extent were posterior in date and seizure of goods to the writs of *feri facias*.

The goods seized under the extent dated in August 1816 were afterwards sold by the sheriff, and the proceeds not being sufficient to satisfy the writs of *feri facias*, the extent dated in July, and also the extent dated in August, the sheriff applied the proceeds of the sale of the goods in part satisfaction of the writs of *feri facias*, and of the extent of July.

These facts being found upon a feigned issue, directed by the Court of Exchequer, judgment was given for the Crown, and affirmed upon writ of error, in effect deciding, that where a subject obtains judgment in an action, and thereupon a writ of *feri facias* issues, which is delivered to the sheriff, who, in execution thereof, seizes the goods of the Defendant; if, while the goods remain in the hands of the sheriff, and before he has sold them, a writ of extent in aid is issued against the same Defendant as debtor of a debtor of the Crown, tested after the seizure under the *feri facias*, and is delivered to the sheriff, the writ of extent, whether it be in chief or in aid shall be executed upon the goods seized under the *feri facias*. — *Giles v. Grover* - P. 277

REVOCATION. See DEVICE.

REGISTRY.

B., being possessed of a term in lands for so many years as he should live, with remainder for the residue of the term to E., his daughter, upon the marriage of E. with W. the term was assigned by B. and E. to trustees, in trust for B. during his life, and upon his death to permit the husband to receive the rents, &c. during his life; and then for the wife and children, in the usual course of marriage settlement. This deed of assignment was not registered. W., being in possession under the trusts of the settlement, after the death of B., demised the lands to K., for 345 years, at a rent of 345*l.*; and the indenture of lease was duly registered; and the interest under this demise was afterwards transferred from K. to I. by a deed of assignment, which was not proved to have been registered. Upon special verdict, stating these facts, it was held, that the lease made by W. to K., being re-

gistered, was, under the effect of the Irish Registry Act, 6 Anne, c. 4., valid against and preferable to the unregistered marriage settlement; and that the interest of I. under the assignment from K., although unregistered, was also valid and preferable to the settlement.—*Warburton v. Loveland* - - - - Page 1.

SEQUESTRATION. See PRACTICE.

#### SHIPPING.

C. and Co., merchants in Calcutta, shipped certain goods on board a vessel of which A. was the captain and B. the owner. The captain signed the usual bill of lading. A., by a contract made between him and B., was appointed to the command of the ship for a voyage from London to Calcutta and back, with liberty to take a cargo, reserving room for 100 tons of goods to be laden on account of the owner. In consideration of which, A., for himself and his executors, &c. agreed to take upon himself the command, and to take the ship into his service for twelve months, and to pay for the use of the ship 25s. per ton per month during the term. But it was further agreed that the bills of exchange which should be given in payment for the freight of the homeward cargo should be made payable to the ship agents in London, as joint trustees for the owner, and the captain to appropriate the proceeds in payment of the balance of freight due under the contract with the owner, and the surplus (if any) to the captain. It was further agreed that an agent for the owner should be put on board, and have controul over the stores of the ship and the provisions, &c.; and in case of any breach of any part of the contract by the captain, the agent had power to remove him, and appoint another captain. It was also provided, in case the ship should be detained more than ninety days at Calcutta, and the captain should not pay 1000*l.* in part discharge of the balance of freight to the agent of the owner, that he should have power to load the ship with a cargo for England on the owner's account, without prejudice, however, to the rights of the owner under the contract with the captain, or any claim in respect of freight, &c.

This contract was shewn by the agent for the owner, upon his arrival at Calcutta, to C. and Co. who, acting as the agents both of the owner and the captain, were employed to collect and pay over to the captain freight received upon the carriage of goods from England, and

to procure for him freight from Calcutta on the homeward voyage.

The goods shipped by C. and Co. having been partly lost and partly damaged on the voyage from Calcutta to London, an action upon the case was brought by C. and Co. against the owner for the loss and damage, in which a special verdict was found, stating the facts as above set forth.

Upon argument of the case in the K. B., judgment was given for the Plaintiffs. But on a writ of error to the Exchequer Chamber this judgment was reversed; and upon a further writ of error to Parliament, the judgment of reversal was affirmed. — *Colvin v. Newberry* Page 167

SOLICITOR AND CLIENT. See ISSUE.

TRUST. See POWER.

In a creditor's suit, in which the bill was filed for payment of the debts of a testator, who had devised and bequeathed to trustees his real and personal estates to be sold for the payment of his debts, a sale was directed under the decree and orders of the Court; and upon the sale, A., being the highest bidder for certain iron-works, &c. was reported the purchaser, and the report was confirmed absolutely. Six months after the order of confirmation a discovery was made by two of the trustees for sale, named by the testator, that A., before the sale, had entered into an agreement with L., their co-trustee, who was the acting manager of the iron-works, to admit L. into partnership of the iron-works, in case A. should become the purchaser; and accordingly, after he was declared purchaser, he proposed to give L. one eighth of the profits of the concern, as managing partner; but, being afterwards doubtful of his capacity to manage it, or desirous of taking another partner, who paid a bonus or profit to him of 7000*l.*, he gave 1500*l.* to L. to relinquish his claim.

Upon a motion made on behalf of the two trustees, who were Defendants in the suit, and affidavits filed in proof of the facts above stated, the order confirming the purchase was rescinded. — *Bailey v. Watkins* - 275

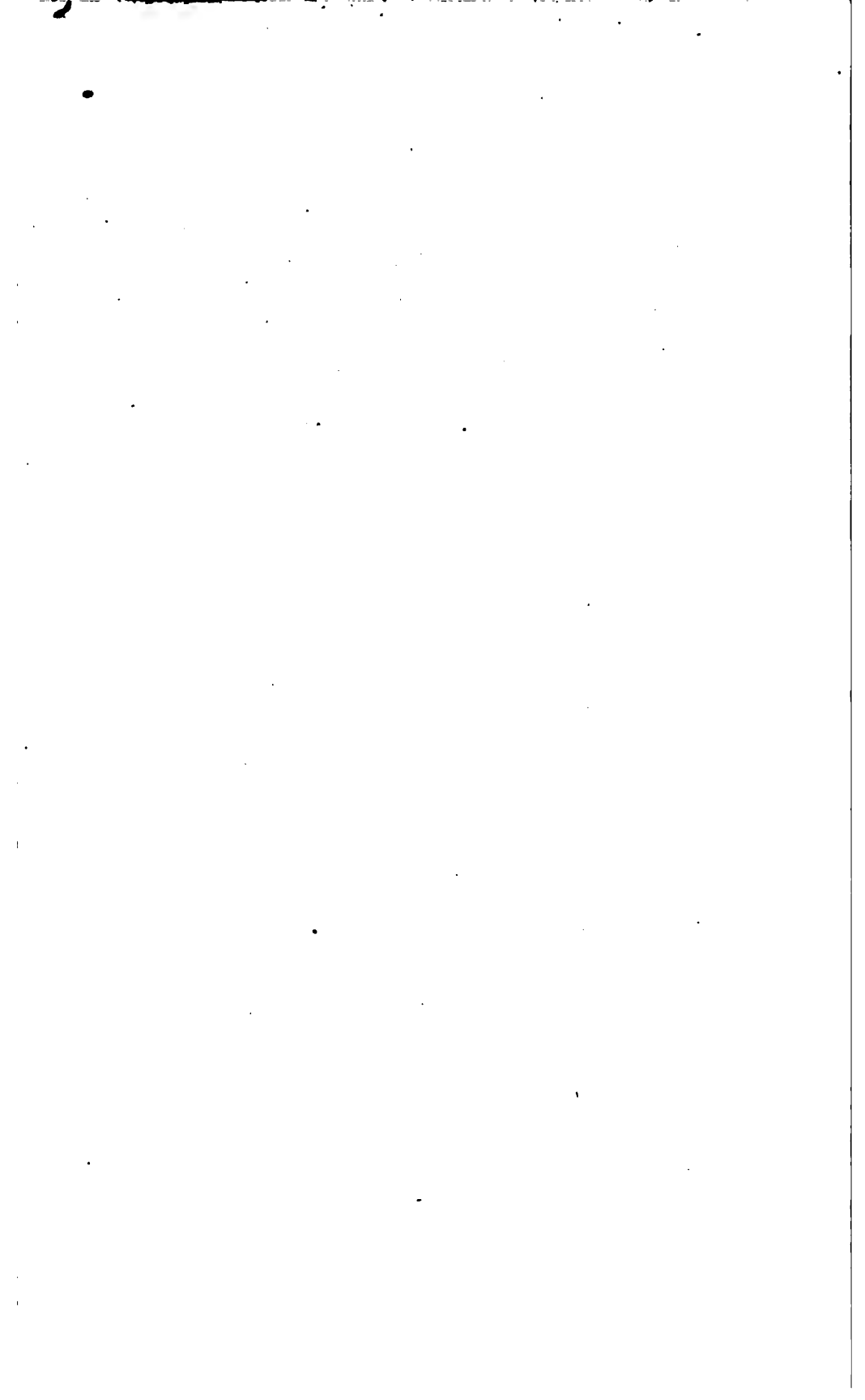
WILL. See DEVISE.

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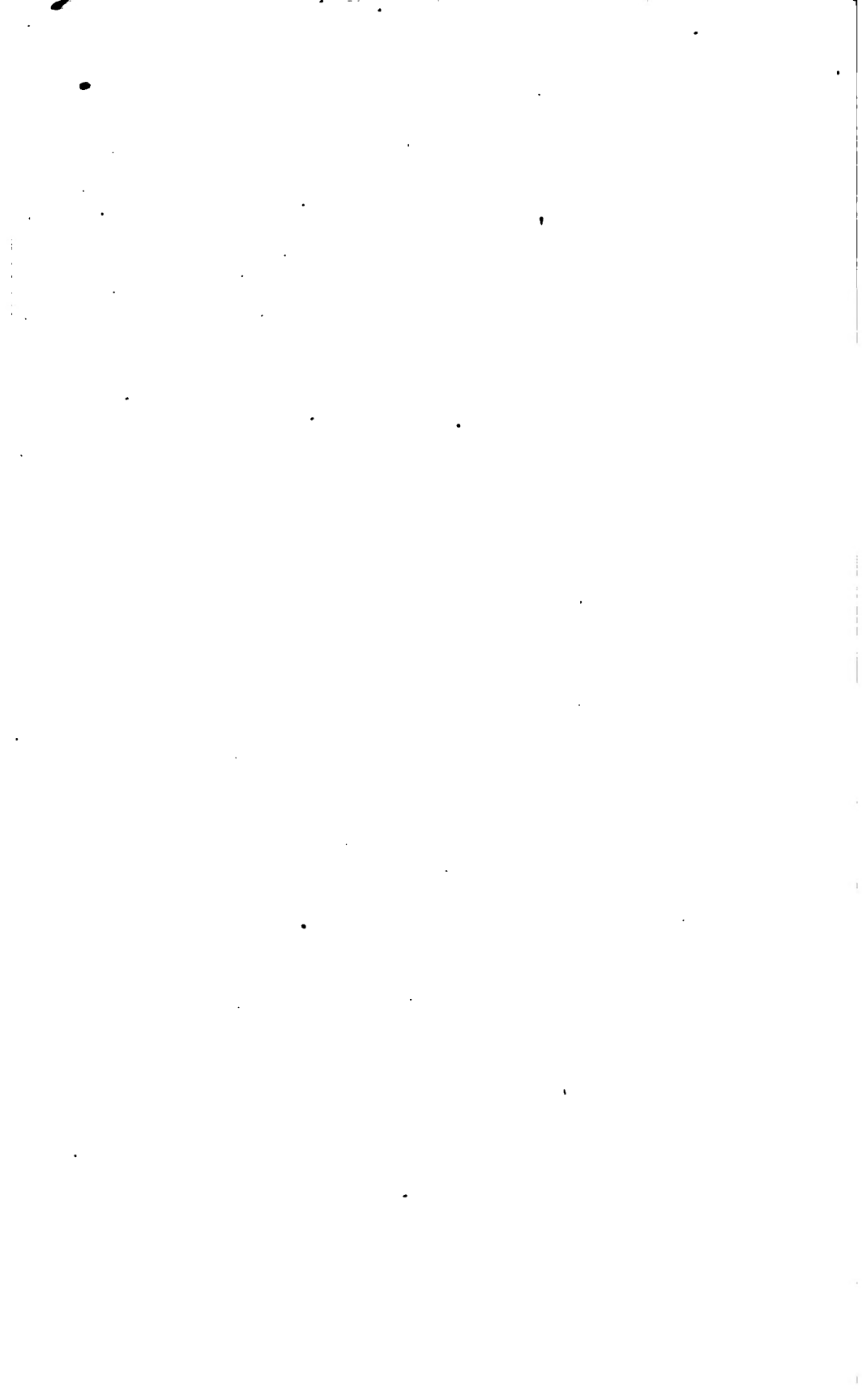


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